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IN THE

Supreme Court of the United States

No. ~~1198~~ 238

October Term, 1956.

SAMUEL KRASNOV and SEYMOUR KRASNOV,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

FANNIE KRASNOV, EMANUEL O. MUNZER and L. ARTHUR GREENSTEIN, EXECUTORS OF THE WILL OF JOSEPH A. KRASNOV, DECEASED,
Appellants,

v.

UNITED STATES OF AMERICA.
Appellee.

On Appeal from the United States District Court for the Eastern District of Pennsylvania

JURISDICTIONAL STATEMENT.

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Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

JURISDICTIONAL STATEMENT.

Appellants appeal from the judgment of the United States District Court for the Eastern District of Pennsylvania, entered on March 14, 1957, granting injunctive and other relief against Appellants, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW.

The opinion of the United States District Court for the Eastern District of Pennsylvania is reported officially in 143 F. Supp. 184 and unofficially in 1956 Trade Cases (C.C.H.) ¶ 68,421. Copies of the opinion, the judgment and orders of the court denying motions of the Appellants for relief from the judgment are set forth in Appendix A to this Statement.

JURISDICTION.

This suit was brought by the United States under Section 4 of the Sherman Act, Act of July 2, 1890 c. 647, 26 Stat. 209, as amended, 15 U.S.C.A. § 4, to prevent and restrain alleged violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C.A. § 1 and § 2.

The judgment of the District Court was entered on March 14, 1957, and notices of appeal were filed in that court on May 10, 1957. One notice of appeal was filed on behalf of Samuel and Seymour Krasnov, and another on behalf of Fannie Krasnov, Emanuel O. Munzer and L. Arthur Greenstein, Executors of the Will of Joseph A. Krasnov, under Rule 46 of this Court. Identical questions are involved in the two appeals, and this single Statement covers both.

Jurisdiction of the Supreme Court of the United States to review the decision of the District Court by direct appeal is conferred by the Expediting Act, Act of February 11, 1903, c. 544, § 2, 32 Stat. 823, as amended, 15 U.S.C.A. § 29. The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *United States v. Times-Picayune Publishing Co., et al.*, 345 U. S. 594 (1953); *United States v. California Cooperative Canneries*, 279 U. S. 553 (1929).

STATUTES INVOLVED.

Though not asserted to be invalid, the following statutes and Rules are involved:

Sections 1, 2 and 4 of the Sherman Act, Act of July 2, 1890 c. 647, 26 Stat. 209, as amended, 15 U.S.C.A. §§ 1, 2 and 4, as they existed prior to the 1955 amendments to Sections 1 and 2.

Section 2 of the Expediting Act. Act of February 11, 1903, c. 544 § 2, 32 Stat. 823, as amended, 15 U.S.C.A. § 29.

Rule 56 of the Federal Rules of Civil Procedure, 28 U.S.C.A. Federal Rules of Civil Procedure, Rule 56.

Copies are set forth in Appendix B to this Statement.

QUESTIONS PRESENTED.

1. Whether, on plaintiff's motion for summary judgment, a court may declare illegal under the antitrust laws a provision for joint enforcement of a single existing patent, contained in an exclusive license agreement on a royalty basis from one defendant manufacturer of slip covers to another, in which agreement the licensee agrees not to sell the licensed product at prices lower than those established by the licensor and to grant to the licensor a limited non-exclusive royalty-free license under a single existing patent, particularly when there is no evidence of the scope and effect of the licensed patent.

2. Whether, on plaintiff's motion for summary judgment, such an agreement furnishes the basis for a finding that the defendants have conspired to fix prices, where the complaint does not allege price fixing, there is no evidence as to the prices actually charged by the defendants, and the Krasnov defendants have offered by affidavit under Rule

56(f) of the Federal Rules of Civil Procedure to prove that there was price competition between the defendants, and there are issues of fact as to the terms and purpose of the agreement, the extent and duration of its enforcement, and the nature of the defendants' operation under the agreement.

3. Whether, in the absence of any evidence as to market structure and behavior bearing on price and competitive opportunity, a court may summarily determine on the basis of the dollar volume of sales of defendants and certain other manufacturers for one year, presented by affidavits offered by plaintiff and based on undefined and unexamined sources of information, that defendants have dominated an industry, particularly where the Krasnov defendants have offered by affidavit under Rule 56(f) of the Federal Rules of Civil Procedure to prove that there was no such domination.

4. Whether a court may summarily determine that defendants control the key patents in an industry where neither of the two patents involved is before the court and there is evidence as to the existence of patents owned by third parties.

5. Whether evidence of concerted action by two slip cover manufacturers as to one kind of slip cover which is functionally interchangeable with other kinds of competing slip covers will support a summary judgment that those manufacturers have conspired to monopolize the slip cover industry, in the absence of any evidence as to the portion of the industry represented by the kind of slip cover involved in the concerted action.

6. Whether an antitrust law violation based upon concerted action under a patent warrants an injunction against the individual employment by the defendants of competitive trade practices unrelated to the patent or to the concerted action.

7. Whether an injunction intended to prevent renewal of a price-fixing agreement and to end a conspiracy to monopolize may prohibit the defendants from individually offering to retailers the kind of price and other concessions that they had used to take business from each other.

8. Whether an antitrust judgment that does more than enjoin the conduct found to be illegal may be entered without any evidence that such relief is required to restore or permit competition in the affected industry.

9. Whether, on a motion for summary judgment, the court may resolve in favor of the moving party issues of fact between documents filed in support of the motion and the pleadings of the party opposing the motion.

10. Whether, on a motion for summary judgment, a court may make findings in conflict with offers of proof contained in an affidavit filed under Rule 56(f) of the Federal Rules of Civil Procedure in opposition to the motion, without giving the party filing the affidavit an opportunity to supply the proffered proofs.

11. Whether contested issues as to a course of business conduct reflected in documents covering a thirteen-year period may be summarily resolved in favor of a party moving for summary judgment by drawing from such documents only the inferences which support the case of the moving party.

12. Whether screening for apparent relevancy documents offered by the plaintiff in support of its motion for summary judgment can take the place of having documents individually offered in evidence and hearing the defendants' specific objections to each.

13. Whether a civil antitrust action brought by the United States for injunctive relief against an individual defendant abates on the death of such defendant before final judgment.

STATEMENT.

The complaint filed by the United States in this actio alleged that the defendants had combined and conspired u reasonably to restrain interstate trade and commerce in th manufacture and sale of ready-made furniture slip cover had combined and conspired to monopolize such trade an commerce, and had attempted to monopolize such trade an commerce in violation of Sections 1 and 2 of the Sherma Act.

Among the defendants named were Joseph A. Krasnov Samuel Krasnov and Seymour Krasnov. They were befor and at the time of the filing of the complaint partners doin business under the name of Sure-Fit Products Co. and wer engaged in the manufacture and sale of ready-made furni ture slip covers. Samuel Krasnov and Seymour Krasno are appellants herein. Joseph A. Krasnov died before en try of judgment and his executors, Fannie Krasnov Emanuel O. Munzer and L. Arthur Greenstein, were mad parties defendant under circumstances which will be de scribed subsequently. They too are appellants herein. Th partnership Sure-Fit Products Co. was not made a de fendant, but the defendants Krasnov are sometimes collec tively referred to herein as "Sure-Fit".

The other named defendants were The Comfy Manu facturing Company, a corporation engaged in the manu facture and sale of ready-made furniture slip covers, it president, Fred E. Katzner, and Arthur Oppenheimer, a individual who is patentee of letters patent 2,100,868 rela ing to furniture slip covers made from knitted fabric

The combinations and conspiracies and attempts t monopolize were alleged in the complaint to have com menced in 1937 and to have consisted of a continuin agreement and concert of action the terms of which include the following:

PATENT ALLEGATIONS.

a. Defendant Comfy would license defendants Krasnov to manufacture and sell slip covers under the Oppenheimer patent held by it, and defendants Krasnov would cross-license defendant Comfy to manufacture and sell to a limited number of customers slip covers embodying the invention claimed in Patent No. 1,984,173 owned by defendants Krasnov.

b. Defendant Comfy, as part of the license agreement, would not without the consent of defendant Krasnov grant licenses to others under the Oppenheimer patent.

c. Defendants would share the expenses resulting from litigation brought against alleged infringers of the Oppenheimer patent.

d and e. Defendants would embark upon a plan under which defendant Comfy would threaten to institute, and institute, patent infringement suits against retail dealers in slip covers alleging infringement of the Oppenheimer patent, and thereafter would endeavor to settle such suits on the condition that the retailer would discontinue handling the infringing slip covers and substitute therefor slip covers manufactured by the defendants.

f and g. Defendants would threaten to institute, and institute, against manufacturers of slip covers patent infringement suits, suits alleging the invalidity of patents owned by others, and suits alleging violations of the antitrust laws.

TRADE PRACTICE ALLEGATIONS.

a. Defendants Krasnov, Comfy and Katzner would injure and destroy competition of other manufacturers in local areas by:

1. purchasing slip covers of competitors from retailers in exchange for full line orders of defend-

ants' slip covers and reselling said slip covers to other retailers at less than the wholesale price;

2. granting special discounts, excessive advertising allowances and abnormal return privileges to retailers who agreed to carry their merchandise exclusively;

3. making and causing to be made derogatory and disparaging statements concerning slip covers made by competitors and concerning the competitors' financial ability to defend the retailer against infringement suits brought against the retailer by the defendants.

b. Defendants Krasnov, Comfy and Katzner would require suppliers of materials for slip covers to agree to refrain from selling to competitors of defendants as a condition to defendants' purchasing from said suppliers.

The answers of the defendants denied all of the operative allegations of the complaint.

Following extensive preliminary proceedings by all parties, the plaintiff on January 21, 1954 filed a motion for summary judgment. In support of its motion, the plaintiff submitted affidavits showing the dollar volume of business of 15 manufacturers of ready-made slip covers (including defendants Sure-Fit and Comfy) for the calendar year 1948. In addition, plaintiff filed a compilation of documents 945 pages in length and labelled Government Exhibits 1 through 504 (referred to herein as GX-1 through GX-504). All of these documents were admitted by the defendants to be genuine. No defendant, however, waived any objection to the admissibiltiy of any document in evidence,[1] and the defendants Krasnov filed a motion to strike all of the documents contained in the

1. Plaintiff's Requests for Admissions addressed to Defendants, Answers of Defendants Krasnov to Plaintiff's Requests for Admissions, Statements of counsel for defendants at Pretrial Hearing of May 17, 1954, pp. 7-8, Statement of the Court at Pretrial Proceedings of May 17, 1954 at p. 32.

compilation upon the ground that they were inadmissible in evidence because subject to the objections, without limitation, of irrelevancy, hearsay, opinion, conclusion, privilege, and not the best evidence.

Thereafter the court held two pretrial conferences, at which it ruled that their purpose was not to make a record on which the case would be considered, but merely to give the Government documents a preliminary screening in order to determine their apparent relevancy.[2] It also ruled that, before these documents became a part of the record, the plaintiff would have to offer them in evidence and the defendants would be given an opportunity to object to their relevancy and competency to prove the allegations in support of which they were offered.[3] On several occasions the court indicated that the case was to be disposed of at trial rather than on the motion.[4]

Notwithstanding these statements, the court on November 28, 1955, set the motion for summary judgment down for argument "on the merits" twenty-two days later (briefs to be filed within seventeen days). This was the first indication given by the court that it considered the record to be in appropriate form for consideration of the case on motion for summary judgment rather than at trial. In opposition to the motion, defendants Krasnov then filed an Affidavit under Rule 56(f) of the Federal Rules of Civil Procedure.[5] The Affidavit under Rule 56(f), a copy of which is set forth in Appendix C to this State-

2. Pretrial proceedings pp. 152-154, quoted in Appendix C to this Statement at pp. 49a-50a.

3. Pretrial proceedings pp. 192, 194, 200-201, quoted in Appendix C to this Statement at pp. 50a-52a.

4. Pretrial proceedings pp. 2, 62, 152-153, 201, 205.

5. An Affidavit under Rule 56(f) rather than under Rule 56(e) of the Federal Rules of Civil Procedure was employed because of the limitations of time imposed upon the defendants and because, as the affidavit stated, ". . . defendant, Sure-Fit, cannot present by affidavit all the facts and details encompassed by the above offers of proof . . . for the reason, inter alia, that such factual matters are voluminous and to a substantial extent in the possession of other parties . . ."

ment, is in essence an offer of proof under oath containing detailed statements of the material which the defendants Krasnov intended to establish in defense of the allegations of the complaint.

The court's opinion on the motion for summary judgment was filed on July 30, 1956. It concluded that defendants had combined and conspired to restrain trade in ready-made slip covers in violation of Section 1 of the Sherman Act and had combined and conspired to monopolize trade in the manufacture and sale of ready-made slip covers in violation of Section 2 of the Sherman Act. The opinion mentions the existence of the trade practice allegations of the complaint but does not discuss them, consider the documents offered to substantiate them, or reach any findings or conclusions with respect to them.

The rationale of the decision depends principally upon an analysis of the patent license agreement between Comfy and Sure-Fit dated October 4, 1948 (GX-1), a copy of which agreement is set forth in Appendix C to this Statement. Under this agreement Comfy granted a license to Joseph A. Krasnov and Samuel Krasnov, then doing business as partners under the name of Sure-Fit Products Co., under the Oppenheimer Patent No. 2,100,868 which relates to knitted slip covers only. The licensee agreed to pay a royalty of five cents on each patented chair cover and ten cents on each patented sofa cover sold by it and agreed that its prices should "be not more favorable than the prices, terms and conditions of sale fixed from time to time and followed by Licensor in making its sales." The agreement also provides that the licensee will not assert Krasnov Patent No. 1,984,973 against certain slip covers sold by the licensor to ten (10) stores. Paragraph 6 of the agreement provides that the licensor and licensee shall jointly determine whether or not suit for infringement should be instituted. In the event that suit is agreed upon by the licensor and licensee, expenses are to be shared. In the event that either the licensor or licensee does not approve

of suit or of a particular disbursement in connection therewith, the other party may at its own expense proceed with the suit or expenditure. The pricing provision of the agreement was cancelled on January 19, 1942 (GX-3), and the agreement was terminated in its entirety effective September 18, 1949.[6]

The court's analysis of the license agreement was as follows:

1. The defendants engaged in illegal price fixing, although this was not alleged in the complaint, and, because the agreement was "used as a two-edged instrument to cut equally for the benefit of the licensor and licensee", it was unnecessary to determine whether or not the pricing provision was a lawful one under *United States v. General Electric Company, et al.*, 272 U. S. 476 (1926).

2. Since the defendants dominated the industry, fixed and maintained prices, and controlled key patents the provision for the limited license back from Sure-Fit to Comfy was an illegal cross-license arrangement when taken in conjunction with the other terms of the agreement.

3. The provision as to joint enforcement of the Oppenheimer patent was unlawful, because the covenant that the licensor would not grant further licenses, so long as the licensee held the license, did not render the license exclusive but constituted an illegal arrangement comparable to that presented in *United States v. Besser Mfg. Co. et al.*, 96 F. Supp. 304 (U. S. D. C. E. D. Mich., 1951), affirmed 343 U. S. 444 (1952).

4. Since the documents offered in support of the motion for summary judgment were admitted to be genuine ". . . no issue of fact can arise with respect to any particular document which might in any wise cast doubt upon or weaken the effect of other documents", and therefore

6. Letter Kalish to Comfy dated July 18, 1949 annexed as Exhibit A to affidavit of Leonard L. Kalish in opposition to motions to strike cross-claim.

no genuine issue of fact could arise from the documents presented in support of the motion.

5. Since the documents offered in support of the motion for summary judgment were admitted to be genuine, no genuine issue of material fact could arise between these documents and the answers of the defendants to the complaint.

On December 31, 1956, argument was had on defendants' exceptions to the plaintiff's proposed final judgment and on defendants' motion for reargument. On March 14, 1957, an order was entered denying substantially all of the defendants' exceptions to the proposed judgment and denying the motion for reargument. Final judgment was entered on the same day.

The final judgment decrees that the patent license agreement of October 4, 1938 was illegal and enjoins its performance. It also restrains certain patent practices and contains provisions for the compulsory reasonable royalty licensing of certain existing and future patents. In addition, it contains stringent injunctive provisions against trade practices alleged in the complaint, although these practices were not found to be illegal in the opinion, that being limited to the patent aspects of the case.

Joseph A. Krasnov died on February 16, 1957, between the date of the opinion and the date of entry of the final judgment. His death was suggested on the record on April 9, 1957. Motions presented first by the surviving defendants, Samuel Krasnov and Seymour Krasnov, and subsequently by the executors of Joseph A. Krasnov,[7] to delete him from the final judgment on the ground that the action did not survive against him and, consequently, the judgment against him was void, were denied by orders of court dated May 3, 1957 and May 10, 1957, copies of which are set forth in Appendix C.

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7. The executors were substituted as parties by order filed May 10, 1957 on a motion of the executors which was made without waiver of the contention that the action abated.

THE QUESTIONS ARE SUBSTANTIAL.

Question 1.

The court below determined that two provisions of the license agreement from Comfy to Sure-Fit dated October 4, 1938 were illegal *per se* under the antitrust laws. These were paragraph 11 of the agreement (Appendix p. 61a) which provides that the licensor ". . . will not grant unto others any right or license, express or implied, under the said letters patent as long as the licensee holds this license. . .", and paragraph 6 of the agreement (Appendix p. 59a) which provides for joint enforcement of the patent against infringers.

The defendants' position was that these licensing provisions were within the scope of the patent and the rights conferred by the patent statute, and hence did not run afoul of the Sherman Act. *Ethyl Gasoline Corporation, et al. v. United States*, 309 U. S. 436 (1940).

An exclusive license is expressly authorized by the patent statute, R. S. 4898, as amended, 35 U. S. C. A. Appendix II, § 47.[8]

The granting of the provision of October 4, 1938, conferred upon Sure-Fit a "non-exclusive and indivisible license" (Appendix p. 57a). This language was required to provide for the retention by Comfy of its right to manufacture and sell slip covers falling within the claims of the patent. The grant of an "exclusive license" in absolute terms would have precluded Comfy itself from making these slip covers and would have conferred the sole right to do this upon Sure-Fit. However, as previously indicated, paragraph 11 of the agreement provides that Comfy shall not grant to any person other than Sure-Fit a license under the Oppenheimer patent. Such a covenant is effective

8. Substantially identical language is found in the new patent statute enacted in 1952, Act of July 19, 1952, c. 950, § 1, 66 Stat. 810, 35 U. S. C. A. § 261.

to convey an exclusive license within the meaning
the patent laws.

"Exclusive licensee" does not mean sole licensee.
bare license may be outstanding in one when the pate
owner grants a license to another accompanied by th
promise that the grantor will give no further license
Western Electric Co., Inc., et al. v. Pacent Reproduc
Corporation, et al., 42 F. 2d 116 (C. C. A. 2nd, 1930
Paul E. Hawkinson Co., et al. v. Carnell, et al., 112 F. 2
396 (C. C. A. 3rd, 1940).

Additionally, paragraph 6 of the agreement of Octob
4, 1938 authorizes the licensee Sure-Fit to sue for infring
ment in the event that the licensor Comfy does not do s
This is the essence of an exclusive license, the right in th
licensee to exclude unlicensed persons from practicing th
invention.

An exclusive licensee may join with the patent owne
in a suit for infringement of the patent. *Western Electr*
Co., Inc., et al. v. Pacent Reproducer Corporation et a
42 F. 2d 116 (C. C. A. 2nd, 1930). An exclusive licens
may not sue in his own name but he can require his licens
to join as an involuntary plaintiff in a suit for infring
ment. *Independent Wireless Telegraph Company v. Rad*
Corporation of America, 269 U. S. 459 (1926).[9]

On this analysis the defendants contended that para
graphs 6 and 11 of the agreement of October 4, 1938 wer
authorized by the patent laws and not in conflict with th
antitrust laws. The court below ruled to the contrary
It reasoned that this was a situation in which the tw
manufacturers Comfy and Sure-Fit agreed and require
Oppenheimer, the patentee, to refrain from licensing othe
members of the industry. It pointed to an agreement be

9. *Crown Die & Tool Company v. Nye Tool & Machine Work*
261 U. S. 24 (1923) has been held to be inapplicable to an exclusiv
licensee. *Independent Wireless Telegraph Company v. Radio Co*
poration of America, 269 U. S. 459 (1926); *Western Electric Co*
Inc., et al. v. Pacent Reproducer Corporation, et al., 42 F. 2d 11
(C. C. A. 2nd, 1930).

tween Oppenheimer and Comfy dated October 25, 1937 (GX 75), entered into before the issuance of the Oppenheimer patent which provides that Oppenheimer shall assign the patent when issued to Comfy (¶ 3), and states that Comfy shall have the authority to grant non-exclusive licenses (¶ 11). It then argues that the agreement between Comfy and Sure-Fit of October 4, 1938, which was approved by Oppenheimer, amounted to an agreement between Comfy, Sure-Fit and Oppenheimer that Oppenheimer would not issue any further licenses without the consent of Comfy and Sure-Fit.

It is submitted that this argument was incorrect. Assuming that under the agreement of October 25, 1937 (GX 475) Oppenheimer did retain the right to license, after the patent issued Oppenheimer by assignment dated January 17, 1938 (GX 476) recorded in the United States Patent Office, assigned all of his right, title and interest in the patent to Comfy. Consequently, when the agreement between Comfy and Sure-Fit was entered into on October 4, 1938 (GX 1), Oppenheimer had no right whatsoever to grant licenses to anyone. While Oppenheimer had the right to demand reassignment of the patent under certain circumstances, this interest did not give the right to license because only one holding legal title or having an interest in the legal title to the patent may grant licenses. *Chemical Foundation, Inc. v. E. I. du Pont de Nemours & Co., et al.*, 29 F. 2d 597 (U. S. D. C. Del., 1928).

The court analogized the situation in this case to that presented in *United States v. Besser Mfg. Co., et al.*, 96 F. Supp. 304 (U. S. D. C. E. D. Mich., 1951), affirmed 343 U. S. 444, but in that case the patentee retained the right to license and the two manufacturing licensees exacted from the patentee an agreement that he would not license others. Here, as previously indicated, the patentee Oppenheimer had no right to license because he had assigned the patent to Comfy and the arrangement between Comfy,

assignee of the patent, and Sure-Fit was an exclusiv license from Comfy to Sure-Fit, which license is withi the scope of the patent laws, and consequently not in vi lation of the antitrust laws. Moreover, in the *Besser* cas the patent was found to control the technology of the enti industry and the manufacturers in that case agreed wit the patentee that they should have veto power over th licensing of future patents. Here the Oppenheimer pate was not even exhibited to the court and no future patent are involved.

The question is significant because it presents a prob lem of the inter-relationship between the patent laws an the antitrust laws and involves the freedom of a patente to dispose of his interest in the patent. If initially th patentee Oppenheimer had assigned all of his right, tit and interest in the patent to Comfy and Comfy had the granted an exclusive license to Sure-Fit, the propriet of the transaction would be unquestioned; but it was foun to be illegal *per se* because the assignment succeeded th agreement between Oppenheimer and Comfy of Octobe 25, 1937 and because Oppenheimer approved the licens agreement from Comfy to Sure-Fit dated October 4, 193

Question 2.

Under the agreement of October 4, 1938, Sure-Fi is licensed under the Oppenheimer patent on a royalty basi and Sure-Fit agrees (¶ 8) that its prices shall ". . . b not more favorable than the prices, terms and condition of sale fixed from time to time and followed by Licenso in making its sales. . . ." (Appendix p. 59a). In para graph 14 of the agreement the licensee Sure-Fit agree that it will not assert Krasnov Patent No. 1,984,973 agains certain of licensor's slip covers as may be sold to 10 store (Appendix pp. 61a-62a). There is no pricing provision i respect of this latter license.

As the matter was originally presented to the court below the plaintiff contended that this arrangement was illegal under *United States v. Line Material Co., et al.*, 333 U. S. 287 (1948), relying on that portion of the opinion which occurs at page 311 and reads as follows:

> "Where two or more patentees with competitive, non-infringing patents *combine them* and fix prices on *all* devices produced under *any of the patents*, competition is impeded to a greater degree than where a single patentee fixes prices for his licensees." (Emphasis supplied.)

The defendants asserted that the pricing provision was valid under *United States v. General Electric Co., et al.*, 272 U. S. 487 (1926), because there is present here a single manufacturing assignee of the patent, Comfy, fixing the prices at which its individual licensee, Sure-Fit, shall sell slip covers under a single patent, the Oppenheimer patent. Since the provision does not provide for the maintenance of prices by Comfy under the Krasnov Patent 1,984,973, the requirements of the *Line Material* case were not met. There was no combination of patents and no fixing of prices on all devices produced under any of the patents.

The court below declined to accept either of these contentions. It ruled that it was unnecessary to decide whether the pricing provision was valid under the *General Electric* case saying:

> "The price arrangement was not executed in a manner so that its purpose can be said to have been the protection of the patentee's monopoly with, of course, the necessary incidental benefits accruing to the licensee; but rather it was used as a two-edged implement to cut equally for the benefit of both the licensor and licensee" (Appendix p. 22a).

This statement is based upon a number of findings made by the court which were erroneous either because they re-

solve genuine issues of material fact or because they dra inferences in favor of the moving party in violation established principles under Rule 56 of the Federal Rul of Civil Procedure.

Since all these findings were made exclusively on doc ments they may be reversed by this Court where "clear erroneous". *United States v. United States Gypsum C et al.*, 333 U. S. 364 (1948) at p. 393-395. The question findings on this subject are as follows:

(a) *The Finding That the Defendants in Fact Fixed a Maintained Prices.* (Appendix pp. 23a, 24a, 31a.)

There is in the record no evidence that the prices the two companies were the same or indeed similar. Plai tiff did not allege price fixing in the complaint and it d not tender the normal foundation of any price fixing ca price lists of the defendants and invoices to the defen ants' customers. Plaintiff's exhibits in themselves sh that there was price competition between the defendan (Compare GX 18 and GX 18(a).) The finding is in dir conflict with the Affidavit under Rule 56(f) filed on beh of defendants Krasnov, which offers to prove in paragra 1(c) that ". . . there has been price competition betwe the defendants, Comfy and Sure-Fit, and also between the defendants on the one hand and others in the indust on the other hand" (Appendix p. 53a).

(b) *The Finding That the Defendants Had the Power Control Prices.* (Appendix, p. 23a).

In support of this finding the court below relied up Government Exhibit 502, which reads in part as follows:

> "*One* of the major benefits derived from the pat has been the fact that it has been completely respect by Sears and Wards, and we have enjoyed an excell volume of business with these mail-order houses. numerous occasions, *competitors have offered them*

> *fringing covers at prices much lower than ours.* However, because it is the definite policy of these two firms to respect patent rights, such offerings have been rejected." (Emphasis supplied.)

This statement is subject to the interpretation that the two mail-order houses mentioned, Sears and Wards, did respect the Oppenheimer patent but it is questionable whether it supports the inference that the defendants had the power to control the prices in the industry.

Moreover, the finding that the defendants had the power to control prices is in direct conflict with certain of defendants' documents which show that prices in the industry were highly competitive and that the defendants were required to offer various price concessions, allowances, discounts and trade privileges in order to meet the prices of other companies competing in the field. (See GX 381-461.)

Finally, the finding under discussion is directly contrary to the Affidavit under Rule 56(f), which offers to prove in paragraph 1(c) that "the defendants did not have the power to control the market price in the industry . . ." (Appendix p. 53a.)

(c) *The Finding That the Defendants Agreed to and Did Maintain Retail Prices.* (Appendix, pp. 23a-24a.)

Of the 504 exhibits filed by the Government, only 14 relate to discussions between the defendants in regard to maintenance of retail prices. The Court drew the following inference from these documents (Appendix, p. 24a):

> "The few times that the deviation from agreed prices occurred demonstrates clearly that each of the defendant companies was extremely solicitous to see that retail prices were maintained at agreed levels."

An equally acceptable inference from this same fact is that there was no serious effort as between the defendants to maintain retail prices. To draw the inference in favor of the moving party, the plaintiff, as opposed to the equally

acceptable inference in favor of the defendants is contrar
to established principles under Rule 56.[10]

The court below also refers in its opinion to the com
plaint of Sure-Fit about Comfy's price reductions to it
customers. Such complaints were entirely proper for th
governing covenant in the agreement was *not* that Sure-F
should maintain prices artificially established by Comf
for Sure-Fit but that Sure-Fit's prices "should be not mo
favorable" than Comfy's. In other words, Sure-Fit wa
not permitted under the terms of the agreement to sell
prices lower than Comfy. At the same time, however, Sur
Fit was not required to establish prices which were high
than those charged by Comfy. Indeed, it could not hav
been under the theory of the *General Electric* case, whic
is that the licensee may be prohibited from impairing h
manufacturing licensor's market by underselling the l
censor.

(d) *The Finding That the Pricing Provision Was Followe
in Practice Even Though It Was Formally Cancelled
1942.* (Appendix, pp. 23a-24a.)

This finding is unsupported by any evidence. The e
hibits (GX 18-33) relied upon by the plaintiff for this pro
osition are all dated prior to 1942 with the exception of E
hibit 33, which is dated only nine days after the date of ca
cellation, in which time the cancellation could not hav
taken effect.

It should also be observed that Exhibit 33 is completel
unrelated to retail pricing. The exhibit is a Comfy inte
office memorandum which refers to a customer of Sure-F

10. "Since it is not the function of the trial court to adjudica
genuine factual issues at the hearing on the motion for summa
judgment, in ruling on the motion all inferences of fact from t
proofs profetred at the hearing must be drawn against the movant a
in favor of the party opposing the motion." 6 *Moore's Federal Pra
tice* (2nd Ed., 1955) ¶ 56.15[3], page 2125. "The court is not, ho
ever, to draw factual inferences in favor of the moving party." *Id.*
¶ 56.15[8], page 2161.

who came into Comfy's office for the purpose of comparing Comfy's prices to its customers with Sure-Fit's prices to Sure-Fit's customers.[11]

As previously indicated, at least two of the Government exhibits (18 and 18-A) show that the pricing provision of the agreement was ignored even while it was in effect. Consequently, it can properly be inferred that the provision was cancelled for this reason. To draw the contrary inference in favor of the plaintiff, that it was followed after it was cancelled, draws an inference in favor of the moving party in violation of established principles under Rule 56.

The court below believed that the findings which have been discussed rendered unnecessary a decision of whether the provisions of the license agreement relating to pricing were invalid under the *Line Material* case or valid under the *General Electric* case. Since these findings could not properly have been made on the record presented to the court, this important legal question remains unresolved.

Questions 3 and 4.

The court below, assuming that the arrangement between Sure-Fit and Comfy constituted a cross-license agreement and recognizing that cross-patent licensing between competitors is not illegal in and of itself, nevertheless concluded that in the context of the present case the agreement of October 4, 1938 was unlawful.

The first of the indicia of illegality referred to in the opinion is the finding by the court that "the defendants were the two largest competitors in the industry and dominated it dollar-wise." (Appendix, p. 24a.) This finding presumably was based upon the data submitted by the plaintiff concerning slip cover shipments for the year 1947, as reported by the 1947 Census, and the dollar volume of

11. Government Exhibits 34-49 refer to Comfy's unilateral policy of suggesting resale prices to its own customers, not to joint action between Comfy and Sure-Fit in this regard. The Government did not contend to the contrary.

business of slip cover manufacturers for the year 194
These figures are incomplete and erroneous as demo
strated in the Jurisdictional Statement filed on behalf
The Comfy Manufacturing Company and Fred Katzner.

Moreover, the finding in question is in direct confli
with the Affidavit under Rule 56(f), which offers to prov
in paragraph 1(a) that from 1937 to date the dollar sal
figures in the industry would show that there was no m
nopoly or attempt to monopolize; in paragraph 1(b) th
there has been freedom of entry into the market and th
there have been many new entrants into the industry; a
in paragraph 1(d) that any particular share of the sl
cover market of either defendant was the result of co
sumer demand resulting from normal commercial stimu
(Appendix, pp. 52a-53a.)

The second indicia of illegality of the cross-licen
agreement relied upon by the court below is the findi
that the defendants fixed and maintained prices. (Appe
dix, p. 24a.) As stated earlier, a finding to this effe
cannot be made without expanding Rule 56 beyond i
proper scope.

The third factor mentioned by the court below to su
tain its conclusion that the agreement of October 4, 19
was an illegal cross-license agreement is the finding that t
defendants control the key patents in the industry. (A
pendix, p. 24a.)

There are only two patents mentioned in the agre
ment of October 4, 1938, Oppenheimer Patent No. 2,100,8
and Krasnov Patent No. 1,984,973.[12] A copy of neither
these patents was exhibited to the court, and accordingly
determination of their scope could properly be mad

12. Comfy Patent No. 2,238,795 mentioned in Government E
hibit 16 and Sure-Fit Patent No. 2,212,485 mentioned in Gover
ment Exhibit 17 were not part of the cross-license agreement. N
copy of either of these patents was exhibited to the court by the plai
tiff, and, therefore, a determination of their scope cannot be mad
In addition, there is no evidence that any products were manufactur
under either of these patents.

There is no evidence that any slip covers were made under Krasnov Patent No. 1,984,973.

It follows that the finding to the effect that the defendants controlled the key patents in the industry is unsupported by any evidence.

The existence of crucial issues of fact with regard to all three findings, and the complete absence of support for the third finding, make it apparent that the court's conclusion as to the illegality of the cross-licensing feature of the agreement of October 4, 1938 cannot stand.

Questions 5, 6, 7, 8, and 9.

The concerted action which is the subject of the adjudication of illegality by the court below relates exclusively to the agreement of October 4, 1938 in respect of the Oppenheimer patent and the conduct of the defendants pursuant to that agreement. The Oppenheimer patent is confined to ready-made slip covers manufactured from knitted fabrics (Appendix, p. 2a), one of four types of ready-made furniture slip cover recognized in the complaint and by the opinion below. No evidence was presented concerning the relative sales in the industry or relative sales by the defendants of the various types of ready-made slip cover nor concerning the volume of sales of knitted fabric slip covers of the type comprehended by the claims of the Oppenheimer patent. Such statistical information as was tendered by the plaintiff in respect of the sales of the defendants and in the industry shows only dollar volume sales figures for ready-made furniture slip covers of all types.

Notwithstanding the limited nature of the product (knitted slip covers within the claims of the Oppenheimer patent) with respect to which the concerted action was found to have taken place and the total lack of information as to the importance of that product to the defendants and in the industry, the court below concluded in its opinion that the defendants had ". . . combined and conspired . . . to monopolize trade and commerce among the several

states of the United States in the manufacture and sale of ready-made furniture slip covers, in direct violation of Section 2 of the Sherman Antitrust Act." (Appendix, p. 32a.) This same finding is repeated in Section III of the final judgment and forms the basis of an injunction against concerted action to monopolize or to attempt to monopolize the manufacture, distribution or sale of ready-made furniture slip covers. (Appendix, p. 34a.)

The conclusion in respect of conspiracy to monopolize is unwarranted by the record and the court's analysis thereof, and the injunctive relief against conspiracy to monopolize has no independent basis because the summary judgment record was not supplemented by the plaintiff at the hearing on the form of the decree. The injunctive provision itself is so vague and all inclusive as to be violative of this Court's admonition that "The decree must not be 'so vague as to put the whole conduct of the defendants' business at the peril of a summons for contempt'; enjoin 'all possible breaches of the law'; or cause the defendants hereafter not 'to be under the protection of the law of the land'." *United States v. Hartford-Empire Company, et al.*, 323 U. S. 386, 410 (1944).

Further examples of injunctive relief excessive on the basis of the summary judgment record are to be found in the trade practice relief contained in the final judgment. Although the trade practice allegations of the complaint were referred to in the opinion, the court did not find those allegations to have been sustained. Nevertheless, injunctive relief relating to these practices was granted in Sections VI (A)-(E) of the judgment and the restraints are joint and several (Appendix, p. 35a) though the allegations with respect thereto asserted that the practices were employed in combination.

Appellants do not suggest that the provisions of the decree must be confined to the type of act found to have been illegally employed, but they do submit that where relief is predicated entirely upon the necessity to dissipate a con-

spiracy, there must be a foundation in the record for concluding that such relief is necessary and appropriate to achieve the desired result. Here the summary judgment record, which did not sustain the trade practice allegations of the complaint, was not supplemented by material indicating the necessity or propriety of injunctive relief against such practices. Moreover, the main thrust of the injunction is against a conspiracy between the manufacturing defendants to fix prices, and the trade practice relief contained in Section VI (C) of the judgment (Appendix, p. 35a) is inconsistent with the restoration of competition between these manufacturers. This section precludes the individual granting to retailers of special concessions, such as, discounts, advertising allowances and return privileges which the record conclusively establishes were used prior to the entry of the judgment by each of the defendant manufacturers to take business away from the other.

The extension of the relief into areas widely removed from the activities found to be illegal, without a record upon which a determination can be made as to the necessity and propriety of such relief, not only was unjustified in the present case but also represents an undesirable precedent which this Court should correct.

Questions 9, 10, 11, and 12.

Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment may be granted only ". . . if the pleadings, depositions and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact. . . ." In the present case plaintiff, in support of its motion for summary judgment, filed, among other things, an affidavit of its attorney to which were annexed a compilation of documents numbered Government Exhibits 1 through 504. Plaintiff asserted that this affidavit, together with the compilation of documents, established the allegations of paragraph 11, the charging paragraph of the complaint. Each of the defendants in its answer to the complaint denied the allegations of paragraph

11. Consequently, if the documents filed by the plaintiff i support of its motion for summary judgment tended to e tablish the truth of the averments of paragraph 11, the would contradict the allegations of defendants' answers.

In the Third Circuit, where on a motion for summar judgment the affidavits and other evidentiary matter o the moving party controvert the allegations contained i the pleading of the opposing party, summary judgment ca not be entered. Such a contradiction creates an issue o fact rather than resolves an issue of fact. *Frederick Ha & Co., Inc. v. Recordgraph Corporation*, 169 F. 2d 580 (C. A. 3rd, 1948); *Reynolds Metals Co. v. Metals Disintegra ing Co., Inc.*, 8 F. R. D. 349 (U. S. D. C. N. J., 1948), affirme 176 F. 2d 90 (C. A. 3rd, 1949); *F. A. R. Liquidating Corp. Brownell, Atty. Gen.*, 209 F. 2d 375 (C. A. 3rd, 1954).[13]

The court below reasoned that the *Frederick Hart* ca was not applicable to the situation presented to it saying

> "I do not see the applicability of the *Frederic Hart* case to the situation which confronts the Cou in this case. The Government has established by th introduction of *documentary evidence* all of the fac necessary to establish its case. The correctness an authenticity of each document, which cover some 9 written pages, have been admitted by at least one o the defendants involved in this action. That there wa a combination between the parties cannot be gainsai Their admitted formal written agreements establis that and no party has attempted to challenge then The documents cover the entire period of operatio

13. Accord, *Chappell v. Gottsman*, 186 F. 2d 215 (C. A. 5t 1950). There are decisions in other circuits which are in conflict wi the *Frederick Hart* case. See, e.g., *Fletcher v. Krise*, 120 F. 2d 8 (C. A. D. C. 1941); *Wm. J. Kelly Co. v. Reconstruction Finan Corp.*, 172 F. 2d 865 (C. A. 1st, 1949). And an amendment to Ru 56 has been proposed to change the ruling in the *Frederick Hart* cas Preliminary Draft of Proposed Amendments to Rules of Civil Pr cedure for the United States District Courts, prepared by the Advisor Committee on the Rules for Civil Procedure, May 1954, Rule 5 p. 50.

> were made concurrently with the events which they purport to portray and, since they are *genuine documents*, no issue of fact can arise with respect to any particular document which might in anywise cast doubt upon or weaken the effect of other documents." (Appendix, p. 19a.)

This statement shows that the court completely misapprehended the effect of the defendants' admissions of the genuineness of the documents tendered by the plaintiff in support of its motion for summary judgment. In admitting the genuineness of the documents the defendants did not concede the truth of the facts stated in them or the accuracy of the inferences which might be drawn from them. Even if all of the statements contained in these documents constituted admissions of the defendants, which they do not, the defendants should have been given the opportunity to offer evidence in support of their answers controverting the matters stated in the documents. With the record thus made the court would have been in a position to resolve the conflicting factual issues, but it lacked authority to preclude the defendants from offering this evidence and summarily to make factual determinations at variance with the averments of the defendants' answers to the complaint.

The defendants did not rest, however, on their answers to the complaint. The Krasnov defendants filed an Affidavit under Rule 56(f) of the Federal Rules of Civil Procedure in opposition to the motion for summary judgment.[14] The court below referred to this affidavit,[15] and

14. An affidavit under Rule 56(f) rather than under 56(e) was employed because of the limitation of time imposed upon the defendants under the circumstances set forth at p. 9 of this Statement and because the factual matters which defendant Sure-Fit offered in the affidavit to prove were both voluminous and to a substantial extent in the possession of other parties.

15. It is quoted from in the Opinion (Appendix, p. 6a) though inaccurately and incompletely and again referred to at Appendix, p. 31a.

then proceeded to make findings in direct conflict with it. Among the findings so made are those which constitute the very foundation of the court's opinion. They include the findings: that the defendants fixed and maintained prices, that they had the power to control prices, and that they dominated the industry.[16]

In addition to making findings in favor of the plaintiff which were in conflict with the answers of the defendants and the Affidavit under Rule 56(f), the court below violated established principles under Rule 56 in other important respects.

From the documents offered by the plaintiff in support of its motion for summary judgment the court improperly drew inferences in favor of the moving party where equally acceptable inferences might have been drawn in favor of the party opposing the motion. A number of examples of this technique have been referred to previously.

Factual conflicts arising out of the plaintiff's documents themselves were resolved in favor of the plaintiff. Thus, the court found that a deliberate division of the trade was intended and achieved by the defendants (Appendix p. 12a). This finding is inferred from a letter complaining that Sure-Fit had offered a price reduction to one of Comfy's customers in violation of paragraph 8 of the license agreement. The inference as to division of trade is contradicted by other documents showing three instances where Comfy gave price concessions to take an account away from Sure-Fit (GX 385, 443, 459), and another document showing the aggressive attitude of Sure-Fit's salesmen toward Comfy—"I must push Comfy out of my territory and I know how to do it" (GX 420).

Finally, although Rule 56 of the Federal Rules of Civil Procedure clearly contemplates that a summary judgment shall be granted only upon ". . . such facts as would be admissible in evidence", the court below at-

16. See discussion, *supra*, at pp. 18-19, 21-22.

tempted to substitute a preliminary screening for relevancy of the documents offered in support of the motion for a hearing at which each document would be individually offered in evidence, and a ruling made upon the defendants' objections to each.

The net effect of the procedure employed was effectively to preclude the defendants from making a defense. It converted Rule 56 into an instrumentality for avoiding a trial where one was clearly required. The question of whether procedures of this type may be employed by United States District Courts under Rule 56 of the Federal Rules of Civil Procedure is important to all litigants in such courts and should be resolved by this Court.

Question 13.

This action was brought against Joseph A. Krasnov, Samuel Krasnov and Seymour Krasnov, individually and not against the partnership of Sure-Fit Products Co. Joseph A. Krasnov died before the entry of the final judgment. No case prior to the present one has been found in which the question whether a civil antitrust action brought by the United States for injunctive relief against an individual defendant abates on the death of such defendant before final judgment. Appellants contend that such actions abate on the death of the defendant because they do not involve property rights, are essentially penal in nature and seek injunctive relief. Treble damage actions rest on an entirely different footing since they involve property rights.

This question is both novel and of significance in relation to future cases arising under the antitrust laws.

CONCLUSION.

For the reasons set forth above, the questions pre
sented by this appeal are so substantial and important a
to require plenary consideration.

Respectfully submitted,

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APPENDIX A.

Opinion.

July 30, 1956

CLARY, J.

This is an action under Section 4 of the Sherman Antitrust Act, 15 U. S. C. § 4, brought by the United States against the above six defendants for alleged violations of Sections 1 and 2 of the Act of Congress of July 2, 1890, c. 647, Stat. 209, as amended, 15 U. S. C. § 1 and § 2. The complaint charges the defendants to be engaged in a combination and conspiracy in unreasonable restraint of interstate trade and commerce in the manufacture and sale of ready-made furniture slip covers among the several states of the United States; a combination and conspiracy to monopolize the aforesaid trade and commerce; an attempt to monopolize and a monopoly. The United States seeks an injunction to restrain the said six defendants from a continuance or revival of the alleged illegal practices and activities. The matter before the Court is plaintiff's motion for summary judgment.

Three of the defendants, Joseph A. Krasnov, Samuel Krasnov and Seymour Krasnov, are copartners in the business of manufacturing and selling ready-made furniture slip covers, doing business under the trade name of Sure-Fit Products Co., with their principal place of business at Bethlehem, Pennsylvania. Hereinafter these defendants shall be referred to collectively as "Sure-Fit". The fourth defendant, The Comfy Manufacturing Company, hereinafter referred to as "Comfy", also in the business of manufacturing and selling ready-made slip covers, is a Maryland corporation, with its principal place of business in Balti-

more, Maryland. The fifth defendant, Fred E. Katzner, is a resident of New York City and at the time covered by the complaint was President of Comfy and as such was actively engaged in the management, direction and control of the affairs and policies of said corporation. The sixth defendant, Arthur Oppenheimer, Jr., is a resident of Boise, Idaho, and is the patentee of U. S. Letters Patent No. 2,100,868, which patent pertains to the manufacture of ready-made furniture slip covers from knitted fabrics.

The subject matter of this action is ready-made slip covers. There are generally four types of ready-made furniture slip covers: woven fabric, woven fabric containing rubber thread, knitted fabric, and knitted fabric containing rubber thread. Such slip covers are completely manufactured at the factory in a number of basic styles adjustable for use on most sizes and shapes of upholstered chairs and sofas in common usage throughout the United States. They are so designed that they may be installed by the user following simple directions without professional guidance. They are distinguished from so-called "custom made" slip covers which are tailored for individual items of upholstered furniture by skilled professional workers who in many cases measure, cut, fit and install such covers in the home of the purchaser. When used hereinafter, the term "slip cover" shall refer to ready-made furniture slip covers.

The Pleadings

The Government alleges that since at least 1937 defendants Sure-Fit and Comfy have been the two largest manufacturers of slip covers in the United States; that in 1949 said defendants manufactured approximately 62 per cent of all slip covers manufactured in the United States; and that thirteen other manufacturers accounted for the remaining 38 per cent, of which the defendants' largest competitor accounted for only 9 per cent of the total

slip covers manufactured; that during 1949 more than twenty-three million dollars worth of ready-made furniture slip covers of all types were produced in the United States; and that Sure-Fit and Comfy manufactured this pro rata percentage share of said slip covers in their factories in Baltimore, Maryland, and Bethelehem, Pennsylvania, respectively, and sold said slip covers in interstate commerce. Further, that some time in 1938, Oppenheimer transferred his title to U. S. Letters Patent No. 2,100,868 to Comfy but retained a reversionary interest therein as well as rights to royalties on slip covers manufactured thereunder.

The alleged conspiracy to evade the Sherman Act is claimed to have commenced in 1939 when, with the knowledge and consent of Oppenheimer, Comfy and Sure-Fit entered into an agreement whereby:

(a) Comfy would license Sure-Fit to manufacture and sell slip covers under the Oppenheimer patent, and Sure-Fit would cross license Comfy to manufacture and sell, to a limited number of customers, slip covers embodying the invention claimed in U. S. Letters Patent No. 1,984,973, which patent was owned by Sure-Fit;

(b) Comfy would not grant licenses to others under the Oppenheimer patent without Sure-Fit's consent;

(c) Comfy was to set the price to be maintained for slip covers manufactured under the Oppenheimer patent, and

(d) The defendants would share the expense resulting from litigation brought against alleged infringers of the Oppenheimer patent.

Further, that subsequent to said agreement, the defendants embarked on a plan whereby Comfy would threaten to institute, and institute, patent infringement suits against retail dealers selling slip covers of competi-

tors, alleging the sale of merchandise infringing on the Oppenheimer patent. That following the institution of such suits, the defendants would endeavor to settle the suits by requiring the retailer to discontinue the sale of alleged infringing slip covers and substitute therefor slip covers manufactured by the defendants.

Finally, the complaint alleges that the defendants would injure and destroy competition of other manufacturers by:

(a) Purchasing slip covers of competitors from retailers in exchange for "full line orders" of defendants' slip covers;

(b) Reselling the merchandise of the competitors to other retail outlets at a price less than wholesale, thereby disrupting the market for their competitors and creating the impression among retailers and consumers that such slip covers were of inferior quality and workmanship;

(c) Granting special discounts, excessive advertising allowances, and abnormal return privileges to retailers who agreed to carry their merchandise exclusively, and

(d) Making or causing to be made derogatory and disparaging statements concerning their competitors' merchandise and their financial ability to defend the retailer against infringement suits which might be brought against the retailer by the defendants.

The Government alleges that the defendants combined and conspired to do these things and that said combination and conspiracy has directly and substantially been an unreasonable restraint on interstate trade and commerce in slip covers and has assured the defendants a dominant position in the manufacturing and distribution of slip covers.

The defendants have filed separate answers in which each defendant generally denies the charges made by the Government. Whether the denial runs to facts, as con-

trasted to the denial of inferences drawn by the Government from facts or documents which are otherwise admitted, is a point which will be discussed later in this opinion.

THE CONTENTIONS

The Government contends that it is entitled to summary judgment because the agreement entered into by Comfy and Sure-Fit was designed to eliminate competition and was inherently illegal for the following reasons:

(1) The parties agreed to pool their patents and to act jointly in prosecuting patent infringement suits which they never intended to allow to be adjudicated;

(2) The parties agreed to relinquish their individual rights to license others and acted jointly in approving or disapproving the applications for licenses;

(3) The parties agreed to price fixing, and

(4) The parties acted together to create market conditions which would eliminate competition.

In support of its allegations the Government has filed, as part of an affidavit in support of its motion, a compilation of documents consisting of 945 pages, containing 504 exhibits. Without exception, these exhibits have come from either the files of one of the defendants, their attorneys, or from the court records of patent infringement suits to which one of the defendants was a party. Except for 14 scattered documents, the authenticity of all of the Government's exhibits has been admitted by at least one of the defendants. Allowing these documents to speak for themselves, the Government contends that these writings establish undisputed facts which prove the essential elements of the complaint and that the legal consequences to be drawn from the facts as established by the documents is the only dispute raised by the defendants' answers or counter-affidavits.

The defendants argue that this Court cannot properly grant summary judgment for the following reasons:

(1) That the Government's motion does not comply with Rule 7(b)(1) of the Federal Rules of Civil Procedure,

(2) That the Government's motion does not comply with Rule 56(c) of the Federal Rules of Civil Procedure, and

(3) That by granting this motion the Court would be depriving the defendants from establishing—by way of defense—the following facts:

(a) "The dollar-rates figure rendered by plaintiff's affidavits shows that there was no monopoly or attempt to monopolize."

(b) That there has been "freedom of entry into the slip cover market",

(c) That "the defendants did not have the power to control the market price",

(d) That "the share of the market had by the defendants was a result of consumer demand", and

(e) That "any patent infringement suits threatened or brought by the defendants against retailers and manufacturers were not threatened or brought for the purpose of harassing competitors."

The contentions of both parties will be discussed later under the heading of Discussion.

The Facts

The following statement of facts is made in the light of the provisions of Rule 56(c) of the Federal Rules of Civil Procedure. They are to be found in the written agreements between the respective parties; in admissions in the pleadings in this action; in the sworn complaints or

answers in infringement suits instituted by defendants in this and other courts, and in documents, the authenticity of which have been admitted by one or all of the defendants, obtained from the files of the defendants or their attorneys, which documents include correspondence between the defendants themselves and between the respective attorneys for the various defendants, interoffice memoranda of the defendants, vouchers and bills of the defendants, and correspondence by the defendants with retailers.

Because of objections by the defendants to the consideration of the various documents outlined above in the motion for summary judgment, pre-trial procedures were availed of to determine which of the exhibits were relevant and admissible. At these hearings the Court determined that all of the documents were relevant and admissible, with minor exceptions. (These latter documents were not referred to in determining the facts.) The most serious of the objections related to the claim of privilege interposed with respect to communications between client and attorney. It was the thought of one of the attorneys that he had preserved the right of privilege for both himself and his client. Since the documents as to which such claim was made had been presented to a Grand Jury, upon a duly issued subpoena, the Court itself examined the Grand Jury minutes and determined that the documents relied upon by the Government were presented without any claim of privilege and that the record of the Grand Jury proceeding reveals that what the attorney considered to be privileged communications were removed from the file without objection by the Government and the files then presented to the Grand Jury. The Court, therefore, determines that the claim of privilege in this case is without foundation and overrules it. As to the other documents relied upon by the Government, all of which were presented without claim of privilege, any attempt now to invoke the claim cannot be considered. The privilege once waived

cannot be regained; *Rogers v. United States*, 340 U. S. 367, 95 L. Ed. 344 (1951). The Court, therefore, determines that there is no genuine issue as to any material fact or any of the inferences which are drawn from the facts outlined below and the documentary evidence attached to, and made part of, the Government's affidavit.

Sometime prior to October 25, 1937, Arthur Oppenheimer, Jr., described by his counsel as a young man of limited financial resources, filed a patent application pertaining to the manufacture of ready-made furniture slip covers from knitted fabrics with the United States Patent Office. On October 25, 1937, while said application was pending, Oppenheimer and Comfy entered into an agreement wherein Oppenheimer assigned his rights and title to the application itself and any letters patent issued thereunder to Comfy. By the terms of the agreement, Comfy was to pay Oppenheimer a royalty of five cents for each chair and ten cents for each davenport cover manufactured and sold. In the event that Comfy did not make and sell 50,000 slip covers in any given year, Oppenheimer had the right to demand reassignment of the application or, thereafter, the patent. Comfy agreed not to sell or encumber the patent in any way and to diligently protect the patent at its own expense. In the event Comfy recovered damages from infringers it was to pay Oppenheimer 25% of the recovery; in the event that the patent was judicially declared to be invalid, Comfy was relieved from paying any future royalties. Paragraph 11 of the Agreement granted Comfy the right to grant nonexclusive licenses to others. On November 30, 1937, Oppenheimer was granted Patent No. 2,100,868 on the aforesaid application. By assignment, dated January 17, 1938, Oppenheimer again "assigned" all his rights, title and interests in and to Letters Patent No. 2,100,868 to Comfy Manufacturing Company for the stated consideration of One Dollar. This instrument was recorded in the United States Patent Office.

While the Oppenheimer application was pending, one Walter L. Fry was granted a patent which incorporated substantially the same improvements claimed in the Oppenheimer application. Fry's patent was issued on November 2, 1937, twenty-eight days before Oppenheimer's. Shortly after the issuance of the Fry and Oppenheimer patents, Comfy and Fry issued a joint statement notifying the trade of the issuance of the patents and stating that they had exclusive rights to manufacture and sell slip covers made of knitted fabric as covered by said patents. Thereafter, the Fry patent and any question of its validity disappears from the scene until some three years later, when, as will hereinafter be set forth, it reappears in what will be called the "Rosner case".

When allegedly infringing merchandise appeared on the market, Comfy faced the difficulty of adopting a policy to protect the Oppenheimer patent. Comfy decided the least dangerous method would be to sue retail stores and it thereupon adopted the policy of starting infringement suits against a retailer only and demanding, as the condition for settlement, discontinuance of the sale of competitor's goods. Discontinuance of the sale of competitor's goods would mean, of course, the adoption of the Comfy line, if the retailer was to carry knitted fabric slip covers.

In accordance with this plan of procedure, on April 7, 1938, Comfy started a suit against Hecht's of New York charging it with the sale of merchandise infringing the Oppenheimer patent; the complaint prayed for an injunction, damages and costs. Hecht was then carrying the Sure-Fit line. Hecht agreed to discontinue the sale of Sure-Fit products and the suit was discontinued on April 27, 1938, without damages or costs. Comfy requested that Hecht send it the following letter:

> "Our attorney has reported to us that he has arranged with your attorney to discontinue the suit brought against us charging infringement of Oppen-

> heimer's Patent covering the sale of Knitted Slip Covers. When the papers were served on us, we investigated the matter and determined that we did not wish to handle infringing merchandise. We accordingly withdrew such infringing Slip Covers from sale immediately, and do not intend to handle them in the future. We wish to thank you for the courtesy in which you handled the situation."

because "such a letter would be of great benefit to us". Hecht complied in substance. Comfy notified retailers carrying competitors' merchandise of the filing of its suits with the intention of later circularizing the trade with letters such as the Hecht letter, or parts of them, for the purpose of discouraging retailers from carrying competing lines. Comfy was not as successful with a similar suit brought by it against Hutzler Brothers in the District Court of Maryland. Hutzler Brothers refused to sign a stipulation recognizing the validity of the Oppenheimer patent and admitting the charge that the merchandise they were handling infringed on said patent. They even refused to agree not to purchase competitors' slip covers in the future, although they did place an order for the Comfy line. The case came up for trial and the Court refused to extend the time for trial beyond March 1, 1939. Considering the whole situation "right ticklish", Comfy had the suit dismissed, even though it gained nothing; it cannot be said that the case was "settled"; Comfy had the suit dismissed because it did not want to go to trial.

At about this time Sure-Fit requested its attorney to make a complete study of the Oppenheimer patent; and, after such a study, they were informed that there was no possibility of the Oppenheimer patent being sustained in an adequately contested suit. Sure-Fit, being the manufacturer, waited for Comfy to sue and assert the infringement claim lodged against retailers. When Comfy did not

sue and Sure-Fit found its customers receiving notices of infringement and being threatened with suit, it started suit against Comfy on January 9, 1938, in the Southern District of New York, seeking to have the Oppenheimer patent declared invalid and charging Comfy with unfair competition and violation of the Antitrust Laws. On October 4, 1938, Comfy and Sure-Fit, with Oppenheimer's approval, entered into an agreement, the basic document of this conspiracy; certain provisons of which the Government alleges to be in violation of the Antitrust Laws. The Sure-Fit—Comfy suit was discontinued by stipulation of counsel three days later, October 7, 193 .

The agreement of October 4, 1938, contained twenty-five numbered paragraphs, many of which will be discussed in greater detail later in this opinion. Generally, the agreement provided as follows: Comfy granted Sure-Fit a nonexclusive license to make, use and sell slip covers under the Oppenheimer patent for a royalty of five cents on each chair and ten cents on each sofa manufactured and delivered by Sure-Fit. (Oppenheimer had meanwhile agreed to lower his royalty rates to Comfy.) Comfy covenanted not to license any other slip cover manufacturer *without the consent of Sure-Fit.* The agreement provided for *joint determination* in instituting infringement suits and the sharing of expenses for this purpose equally. Sure-Fit in turn cross-licensed Comfy to make, use and sell, to a limited number of customers, slip covers covered by Patent No. 1,984,973, which patent was owned by Sure-Fit. The parties also agreed to *maintain prices* which were established by Comfy and attached to the agreement in a separate schedule, Comfy had the right to revise the schedule at its option. Comfy was to send letter notices of the licensing to every person and corporation that had been notified by Com of Comfy's ownership of the Oppenheimer patent. Oppenheimer approved the licensing agreement "in cor ideration of the potential benefits and

advantages which said agreement represents to (him)". The Agreement was signed by Oppenheimer. All of the parties, Comfy, Sure-Fit and Oppenheimer, entered into this agreement at a time when the question of the validity of the Oppenheimer patent had not been determined and, in fact, after all parties concerned had clearly agreed never to permit judicial determination of its validity, as reflected by a subsequent and continuous course of action.

The motivation for this agreement can best be summarized by the often quoted remark "If you can't beat them, join them". Comfy wanted to avoid any possibility of testing the validity of the Oppenheimer patent; Sure-Fit had lost Hecht's and would undoubtedly lose a number of other customers who were being threatened with infringement suits. A Chicago account of Sure-Fit, Goldblatts, was already being sued by Comfy and for jurisdictional purpose Sure-Fit felt it best not to defend for Goldblatts. If these two manufacturers were to enter into an agreement whereby each would be assured that it could keep its present accounts without fear of competition from the other and, if by joint force, they could venture into the trade with threats of infringement suits against customers of competitors, their mutual and individual interests would be served. The alternatives offered by adjudication of the Sure-Fit-Comfy suit were of no particular advantage to Sure-Fit and they were somewhat frightening to Comfy. Comfy would gain all or lose all, and here the certainty of Sure-Fit's attorney as to the invalidity of the Oppenheimer patent must not be minimized; Sure-Fit would, at best, create a wide open field if it were successful. That a deliberate division of the trade was intended (and achieved) by the defendants is proved by a letter written in August of 1940 by Comfy to Fred A. Klein, Esquire, its attorney, wherein Comfy complained that Sure-Fit had crossed the line and offered a price reduction to one of Comfy's customers. Comfy wrote

that while violations as to price reduction, directly and indirectly, existed from the first, these violations were not offensive and had not been made "an issue" because they were "confined mostly to Sure-Fit's own customers". The retail price was being maintained despite these violations and Comfy felt that "no real harm was being done by such violations". Further, Comfy wrote that it also found it necessary to deviate as to prices from time to time among its own customers but felt that if they were to encroach upon each other's accounts then there was "no purpose" in continuing the agreement. To correct this breach, which occurred nearly two years after the signing of the agreement, it was suggested that "the best solution would be a verbal reaffirmation of the purposes of the agreement. We must both understand and agree that an occasional reduction in price or other inducement may be necessary because of some local situation or competition with nonlicensed manufacturers. However, we must definitely understand each other that we cannot approach each other's accounts with inducements".

After the defendants entered into the agreement, they followed the above course as to each other's customers, they joined in policing and checking the trade, they were in constant contact with each other, and they would inform each other of any price violation which came to their attention. They jointly informed the trade of Sure-Fit's licensing by sending out two separate mailings of 1,836 letters each. Comfy sent a letter to Amerling & Angello, Esquires, attorneys for Hecht Bros., informing them of Sure-Fit's license and inviting them to return to Sure-Fit: "In view of this license, Hecht Bros. is at liberty to purchase such slip covers from Sure-Fit Products Company."

Comfy and Sure-Fit circularized the trade generally and sent letters to individual retailers selling competitors' merchandise, threatening them with suit unless they discontinued the sale of such merchandise. They recognized

and took full advantage of the almost universal aversion of a retailer to patent litigation and their suits were brought for the purpose of having the retailer discontinue a competitor's line and adopt theirs; they had no interest or intention of adjudicating the validity of the Oppenheimer patent. They sought consent decrees from stores which could be represented as acknowledgment or adjudication of the validity of the Oppenheimer patent. Letter agreements not to handle competitors' products were accepted from a retailer and the suit was then discontinued. When the retailer would handle such merchandise again, the defendants sued on the letter agreements rather than for infringement. In general, the pattern of the Hecht and Hutzler suits was followed.

Ten suits were instituted against retailers without the validity of the Oppenheimer patent ever being adjudicated. The defendants tolerated continuous alleged violations of the Oppenheimer patent despite the fact that an adjudication of its validity would have been a complete answer to their problem. They never collected damages for past alleged violations and they never collected expenses for any of their suits from retailers. Their gain was the addition of another customer at the expense of some other manufacturer.

Four suits were instituted against manufacturers directly. The first was against Med-Vogue Corporation in the Southern District of New York. This suit was started by Comfy on October 13, 1938, just nine days after the agreement between Comfy and Sure-Fit was reduced to writing and signed. Med-Vogue filed an answer and a counterclaim in which it asserted that the Oppenheimer patent was invalid for various reasons, that the suit was instituted solely for harassing purposes, and that Comfy, Sure-Fit and Oppenheimer, knowing that the Oppenheimer patent was not valid, entered into an agreement for the purpose of threatening and intimidating retailers with the effect, and for the purpose, of deterring and preventing

them from purchasing Med-Vogue covers. Comfy alone was the plaintiff in the suit; Med-Vogue's counterclaim included Sure-Fit. The suit and counterclaim were discontinued on June 7, 1939, after an agreement had been entered into by the parties. The agreement provided that Med-Vogue would discontinue the sale of knitted slip covers, that the respective rights of both parties to manufacture woven slip covers would remain unchanged, that Med-Vogue was released from liability for any possible past infringements, and that Comfy would purchase Med-Vogue's inventory and machinery for $8,309.36, plus $1,500. for finished slip covers on hand. This "settlement" cost the defendants nearly $10,000; $500.00 was contributed by Oppenheimer and the balance was borne equally by Comfy and Sure-Fit.

The second suit against a manufacturer, Vatco Manufacturing Company, was instituted in January, 1939. It was brought about by a combination of circumstances which left Comfy no alternative but to institute suit. Comfy circularized Vatco's customers with infringement notices and threats of suit. Vatco, by letter dated October 21, 1938, wrote Comfy that it believed the Oppenheimer patent to be invalid and it invited Comfy to sue for infringement. When, by early December, Comfy did not institute suit, Vatco circularized the trade, advising that it believed Patent No. 2,100,868 to be invalid, that it had sent a registered letter to Comfy calling upon Comfy to sue Vatco, that no suit had been brought, that Comfy's circular was for the mere purpose of intimidating the retailer and that Vatco would, upon request, give any of its customers a letter guaranteeing the customer against all actions for infringement of the Oppenheimer patent. Vatco also referred to its financial standing as a guarantee of its strength. This case was settled by an agreement wherein Vatco was to pay Comfy a certain amount of money, and Comfy was to stop sending circular letters to Vatco's customers, was not to sue Vatco or its customers

for infringement, unless the patent was first adjudicated, and it was to send a notice to Vateo of any suits started involving infringement of the Oppenheimer patent. Vateo's future was then clear except for the possibility that the patent would be adjudicated to be valid, in which event it would find itself liable for all damages from the date of the agreement.

The third suit against a manufacturer was brought in June, 1941, against the Malden Novelty Co., Inc. Service was quashed for want of jurisdiction and the defendants never attempted to reinstate the action.

The fourth suit instituted against a manufacturer had some unforeseen results. The financial strength of Dyer-Gruen-Jackson, Inc. was carefully checked and when it was found that it was weak and, in fact, almost out of business, it was decided to institute suit against that company. The complaint was filed on June 18, 1941, in this Court and Dyer-Gruen-Jackson, Inc. answered. Then, to the surprise of the defendants, Louis Rosner moved to intervene as a defendant in the action. The motion alleged that Rosner, doing busines under the trade name of Franklin Cushion and Drapery Company, was engaged in the manufacture of slip covers, as a sublicensee of Dyer-Gruen-Jackson, Inc. under the Fry patent referred to above, and that Dyer-Gruen-Jackson, Inc. itself was no longer manufacturing slip covers. The court granted the motion and Rosner was made the defendant. Rosner filed an answer and counterclaim; Comfy moved to strike the counterclaim, and Rosner moved for summary judgment. With Oppenheimer's and Sure-Fit's approval, an agreement was entered into between Comfy and Rosner, on Rosner's terms. Rosner received a substantial sum in settlement and he recived a license under the Oppenheimer patent. By the terms of the agreement, Rosner was granted a nonexclusive license; he was exempt from paying royalties on knitted slip covers of the type he had been manufacturing and as to other types of knitted slip covers he was to

pay a flat 2% royalty on the net selling price of each unit, but no royalties were due for the first $37,500. of net sales annually. The royalties received from Rosner were divided in equal thirds by Comfy, Sure-Fit and Oppenheimer, and Sure-Fit's royalties were substantially reduced. Settlement of this suit constituted a total loss at great expense to Comfy, Oppenheimer and Sure-Fit, despite the fact that the latter had its own royalties reduced. Adjudication of the validity of the Oppenheimer patent was avoided, however.

Comfy instituted suits against Gimbel Brothers, A. I. Namm & Sons, Selrite, Inc., Mandel Brothers, Inc., C. F. Hovey Company, Frank and Seder, and three suits against Lit Brothers, all retailers. Generally the effect of these suits was to force the retailers to discontinue purchase of competing lines. Those cases in which the retail defendant showed any aggressiveness in the defense, the suit was discontinued for lack of prosecution. In no case was there any adjudication on the merits. The result of the present defendants' suits against defendant retailers, carefully chosen by them, was calculated to and did extend their dominion in the slip cover field.

Discussion

Before venturing into the vast number of arguments advanced by both sides on the merits of this case, it would be well to dispose of the two procedural arguments advanced by defendants.

The first is defendants' contention that the motion for summary judgment must be denied for lack of compliance with Rule 7(b)(1) of the Federal Rules of Civil Procedure. Rule 7(b)(1) provides as follows:

"(b) *Motions and Other Papers.*

(1) An application to the court for an order shall be by motion which, unless made during a hear-

ing or trial, shall be made in writing, *shall state with particularity the grounds therefore*, and shall set forth the relief or order sought. . . ." (Emphasis supplied.).

Defendants contend that the Government's motion does not set forth the grounds upon which it seeks summary relief. With this I cannot agree. I do not consider this rule to establish a mere technical requirement but rather hold it to be "real and substantial". *Steingert, et al. v. National City Bank of New York*, 36 F. Supp. 486, (D. C. N. D. N. Y. 1941). A reading of the motion, however, can leave no doubt as to the theory upon which plaintiff is proceeding. After listing the pleadings and papers upon which the Government relies the motion "moves the Court pursuant to Rule 56 of the Federal Rules of Civil Procedure for summary judgment". Rule 56 completely sets forth the procedure and basis for granting summary judgment in Federal practice. When a motion is so explicit, the grounds therefore have been set forth with particuarity within the meaning of Rule 7(b)(1) of the Federal Rules of Civil Procedure. *Galdi v. Jones*, 141 F. 2d 984, (C. C. A. 2, 1944).

As to the second procedural point, the principal argument advanced by the defendants is twofold. First, that on the present record, the case is not susceptible of disposition on motion for summary judgment, and, secondly, that the plaintiff's affidavits and exhibits thereto create genuine issues of material fact which compel denial of its motion for summary judgment. Great reliance has been placed upon the decision of the United States Court of Appeals for this Circuit in *Frederick Hart & Co. v. Recordgraph Corporation*, 169 F. 2d 580 (1948). In that case the court held that affidavits filed in support of motions for summary judgment may be considered for the purpose of ascertaining whether an issue of fact is present but that they cannot be used as a basis for deciding the fact issue.

I do not see the applicability of the *Frederick Hart* case to the situation which confronts the Court in this case. The Government has established by the introduction of *documentary evidence* all of the facts necessary to establish its case. The correctness and authenticity of each document, which cover some 945 written pages, have been admitted by at least one of the defendants involved in this action. That there was a combination between the parties cannot be gainsaid. Their admitted formal written agreements establish that and no party has attempted to challenge them. The documents cover the entire period of operation; were made concurrently with the events which they purport to portray and, since they are *genuine documents,* no issue of fact can arise with respect to any particular document which might in anywise cast doubt upon or weaken the effect of other documents. The United States Court of Appeals for this Circuit has approved the use of documentary evidence in determining affirmative facts necessary to the decision of a matter and has upheld the use of such documentary evidence in taking a case away from the jur[illegible]; *Croll v. John Hancock Mutual Life Insurance Co.,* 198 F. 2d 562 (1952). The Supreme Court of the United States in *Associated Press v. United States,* 326 U. S. 1, has likewise approved the use of documentary evidence in motions for summary judgment in Antitrust cases. In the case of *Morton Salt Co. v. G. S. Suppiger Co.,* 314 U. S. 488 (1942), the Supreme Court affirmed the action of the District Court in granting defendant's motion for summary judgment on the basis of facts which had come before it clearly evidencing lack of merit in plaintiff's contention. It appears, therefore, that the doctrine of the Frederick Hart case, *supra;* is no bar to summary judgment in this case, if the undisputed documents show a conspiracy to restrain trade and monopoly, acts done in accordance with the conspiracy and harmful effects upon trade in the particular industry. That all of these require-

ments are met in this case will appear clearly as the opinion progresses.

The further objection that these documents might not be admissible in evidence has also been carefully considered by the Court. As before stated, the only objection which gave the Court any difficulty went to the question of privilege. That objection of the defendants has been resolved in favor of the Government. There has been no violation of privilege in this case. Further, communications with third parties, as contrasted to those between the various defendants, are clearly relevant and admissible. Once having established the fact of conspiracy any writings of the parties in furtherance of the conspiracy, whether between themselves or third parties, are relevant and admissible against all of the defendants. I, therefore, have no difficulty in concluding that all of the documents are relevant and admissible and all will be used, except as otherwise noted above, in the determination of this issue.

The next question to be determined is whether or not this matter is one to be appropriately disposed of by summary judgment. There can be no doubt that summary judgments are as applicable to actions under the Sherman Act as they are to any other type of actions, legal or equitable. *Associated Press v. United States*, 326 U. S. 1 (1945); *Morton Salt Co. v. G. S. Suppiger Co.*, 314 U. S. 488 (1942); *International Salt Co. v. United States*, 332 U. S. 392 (1947); *United States v. Gypsum Co.*, 340 U. S. 76 (1950). Under Rule 56(c) of the Federal Rules of Civil Procedure a motion for summary judgment may be granted only

> ". . . if the pleadings, depositions and admissions on file, together with the affidavits, if any, show that there is *no genuine issue as to any material fact* and that the moving party is entitled to a judgment as a matter of law."

Thus, in the matter before the Court, I may grant the Government's motion and enter judgment in its favor if: (1) All of the pleadings, affidavits and exhibits show that there is no genuine issue of fact whatsoever existing between the parties, any dispute between them going only to the legal significance to be given to such facts, or (2) since the complaint sets forth a number of allegations, any one of which, standing alone, would warrant a finding that defendants have violated the provisions of the Sherman Act. I may likewise determine whether the documentary evidence clearly supports the alleged "per se" violations of the Antitrust laws.

PRICE-FIXING

The Government has charged that the defendants' agreement and conduct in relation to price-fixing was, from the beginning, illegal per se, citing a number of cases in support of its contention. The Court will limit its consideration to the main argument which develops from the language in *United States v. General Electric*, 272 U. S. 476 (1926); *United States v. Unives Lens Co.*, 316 U. S. 241 (1942), and *United States v. Line Material Co.*, 333 U. S. 287 (1948). The defendants also place great reliance upon *United States v. General Electric*, supra. That case involved an agreement between General Electric and the Westinghouse Company through which Westinghouse was licensed to manufacture incandescent light bulbs under a number of General Electric's patents, on condition that it should sell said bulbs at prices fixed by General Electric. The price agreement was upheld as a valid exercise of patent rights. The court said:

> "When a patentee licenses another to make and vend, and retains the right to continue to make and vend on his own account, the price at which his licensee will sell will necessarily affect the price at which he can sell his own patented goods. It would seem entirely

> reasonable that he should say to the licensee, 'Yes, you may make and sell articles under my patent, but not so as to destroy the profit that I wish to obtain by making and selling them myself.' "

As in the instant case, the General Electric case has often been cited as authority to support diametrically opposing contentions.

In *United States v. Line Material Co.*, supra, Mr. Justice Reed devoted some time to a consideration of the General Electric case, but refused to define its limits or interpret the basis for its rule. His stated reasons for not doing so was that a majority of the court could not agree on the basis for affirming its rule, nor was there a majority to overrule it. The Line Material Co. case still left undecided "the many variables of the General Electric (case) that may arise". One of these variables is presently before the Court. Quoting Mr. Justice Reed:

> "Where a conspiracy to restrain trade or an effort to monopolize is *not* involved, (the General Electric case holds that) a patentee may license another to make and vend the patented device with a provision that the licensee's sales price shall be fixed by the patentee."

I need not decide this variable, however; the conduct of the defendants pursuant to the agreement renders it unnecessary. The price arrangement was not executed in a manner so that its purpose can be said to have been the protection of the patentee's monopoly with, of course, the necessary incidental benefits accruing to the licensee; but rather it was used as a two-edged implement to cut equally for the benefit of both the licensor and licensee. Comfy complained to Sure-Fit when one of the latter's customers failed to maintain the retail price and Sure-Fit sent out a salesman to adjust the matter; Sure-Fit in like manner and with apparent equal right watched Comfy's customers. It complained about Gimbels, Strawbridge and Clothier,

and Goldblatt's. Comfy replied to the complaints and assured Sure-Fit that it would take steps to adjust these matters, and thereafter Comfy kept Sure-Fit advised of its progress along these lines. They each had an interest in maintaining a set retail price and they each took action towards that end. The agreement operated equally for the benefit of the patentee and the licensee and does not fall within the rule of the General Electric case, as such. There is no question that the agreement potentially tended to eliminate competition and was an unreasonable restraint on trade within the meaning of the Sherman Antitrust Act.

The Government has also shown the power of the defendants to control prices in this particular field and how it was accomplished. It would be extremely difficult for the defendants ever to argue in view of a letter dated August 11, 1949, defendant Katzner wrote to Sure-Fit (Government Exhibit 502) that no such power existed. Part of the letter reads as follows:

> "*One* of the major benefits derived from the patent has been the fact that it has been completely respected by Sears and Wards, and we have enjoyed an excellent volume of business with these mail-order houses. On numerous occasions, *competitors have offered them infringing covers at prices much lower than ours.* However, because it is the definite policy of these two firms to respect patent rights, such offerings have been rejected." (Italics supplied.)

That the defendants actually fixed and maintained prices is clearly evidenced by documentary exhibits showing that where retailers such as Strawbridge and Clothier and Gimbels, large department stores in Philadelphia and vicinity, were selling products of one of the two defendant companies at lower prices than had been agreed upon, the attention of the respective manufacturer was called to this situation and each in turn not only agreed to but did bring the retail level back to the agreed prices. The patently

illegal price feature of the program, it is true, was cancelled in 1942, but the documentary evidence in the case clearly demonstrates that while cancelled as a formal provision of the contract, it was, in fact, followed in practice. The few times that the deviation from agreed prices occurred demonstrates clearly that each of the defendant companies was extremely solicitous to see that retail prices were maintained at agreed levels.

CROSS-LICENSING

Next, the Government contends that it is entitled to summary judgment because of the illegality of the cross-licensing agreement of Comfy and Sure-Fit. The defendants argue that cross-licensing is permissible under the holding of *Standard Oil Co. v. United States*, 283 U. S. 163 (1931), the leading case on patent pooling and cross-licensing. Prior to the Standard Oil decision, the case law was hopelessly confused and divided along two lines: One, emphasizing the narrow exception of the "legal monopoly" granted by patent law, and the other emphasizing the prohibition of "unlawful restraint" imposed by Antitrust law. Mr. Justice Brandeis established the rule that a pooling arrangement or cross-licensing between competitors is not illegal in and of itself, but that it may become illegal if it is part of a larger plan to control interstate markets, stating

> "Such contracts must be scrutinized to ascertain whether the restraints imposed are regulations reasonable under the *circumstance*, or whether their *effect* is to suppress or unduly restrict competition."

Here, the defendants were the two largest competitors in the industry and dominated it dollar-wise. They fixed and maintained prices, they controlled the key patents in the industry, they shared the cost of infringement suits, and

neither granted rights under the said patents to any third parties until they found it necessary to do so, at which time they did so by mutual consent in accordance with their agreement. Under these circumstances I think the defendants were well beyond the protection afforded by patent grants. I need not determine cause and effect as between the *agreement* and the *circumstances;* it is sufficient to note that their combined effect was to stifle competition.

Right to Jointly Determine Maintenance of Infringement Suits

The Government alleges that two other provisions of the licensing agreement between Comfy and Sure-Fit render it illegal. It is the Government's position that Paragraph 11 of the Agreement grants Sure-Fit the right to prohibit Comfy from licensing others and that Paragraph 6 provides for joint determination in instituting infringement suits and that such a grant and provision are illegal because they establish an effective means by which the defendants could restrain trade in violation of the Antitrust laws. The defendants answer that these provisions of the licensing agreement are sanctioned under Patent law and that, as such, they are immune from the Antitrust laws. These provisions are treated separately in the Government's briefs and are answered accordingly by the defendants. Because of their interrelation I shall consider the two together.

Paragraph 11 reads:

> "The Licensor (Comfy) covenants and agrees that it will not grant unto others any right or license, expressed or implied, under the said (Oppenheimer) Letters Patent as long as the Licensee (Sure-Fit) holds this license, nor will Licensor sell such slip covers to slip cover manufacturers."

Paragraph 6 reads:

"Should infringements of the said Oppenheimer patent appear in the market, the Licensor and Licensee shall jointly determine whether or not suit shall be instituted. All disbursements, costs and expenses in connection with such suits shall be subject to the joint determination of the Licensor and Licensee and all such disbursements, costs and expenses, before incurred shall have the approval of both Licensor and Licensee. In the event Licensor and Licensee does not approve of suit or of a particular disbursement, cost or expense, the other party may in its discretion, at its own expense, proceed with such suit or expenditure. The disbursements, costs and expenses of such suit, when so approved, shall be borne equally by the Licensor and Licensee and any contribution by Arthur Oppenheimer, Jr. shall be credited to such disbursement, costs and expenses."

At this point in their briefs, both counsel are poles apart in their treatment of these clauses. The Government describes the grant by Comfy to Sure-Fit as a "non-exclusive license" and the defendants give it the appellation of "exclusive license". Upon this major premise, each respective conclusion is irrefutable. The Government's argument stems from *Crown Die and Tool Company v. Nye Tool & Machine Works*, 261 U. S. 24 (1923). In that case, the plaintiff, who sought to enjoin an alleged infringement of a screw-threaded cutting device, claimed as the basis of his right to sue an assignment from the patentee which granted him no other rights under the patent. Mr. Chief Justice Taft, discussing at great length the rights of a patentee under our Federal Patent Laws, concluded that the right to make, use and vend an invention are rights derived from common law, as based on natural law, and that all the Government grants a patentee is the

right to exclude others from making, using or vending his invention. He reasoned, however, that this right to exclude others is not assignable in and of itself, for it is merely an incident of the common law right to make, use and vend, and that the incident of exclusive enjoyment is government protected only if a person (patentee or assignee) has also the right itself. A licensee, though he does not have legal title, also acquires the incident of exclusive enjoyment, which right is coextensive with whatever right to make, use or vend he may have. It follows that although a licensee cannot sue in his own name where he has a license to be the exclusive maker, user, or vendor under a patent (an exclusive licensee), he has the power to compel the patentee to protect his incident of exclusive enjoyment and he may thus join the patentee in a patent infringement suit. *Independent Wireless Telegraph Company v. Radio Corporation of America*, 269 U. S. 459 (1926), opinion by Chief Justice Taft. *Western Electric Co., Inc. v. Pacent Reproducer Corp.*, 42 F. 2d 116 (C. C. A. 2d, 1930), applies this same rule where the licensee was granted all rights under the patent, except for a reservation of the right to practice the invention on the part of the licensor. The court still termed such a holder an "exclusive licensee". Thus, under Patent law, where one is an "exclusive licensee" he has a right to exclude others as an incident of patent monopoly and he does not run afoul of the Antitrust laws.

Here, the defendants claim that Sure-Fit is an "exclusive licensee" because the licensing agreement granted to Sure-Fit all rights under the Oppenheimer patent save the right which Comfy reserved for itself. This being so, it is contended that they could legally spell out in the agreement that which the law otherwise allows. With this I must agree. But, it is to be remembered that Comfy was not the patentee of the Oppenheimer patent; it was an assignee. We must, therefore, look to see what rights were

vested in Comfy for, if it did not have the power to grant Sure-Fit an exclusive license, the defendants' argument is of no avail.

Under date of October 20, 1937, Oppenheimer and Comfy entered into an agreement whereby Oppenheimer assigned his then pending patent to Comfy; this agreement contained 19 numbered paragraphs which covered six double-spaced typewritten pages. The agreement contained provisions for royalties, the keeping of records and accounts, infringement suits, assignments by Comfy to third persons, licensing by Comfy of third persons and the automatic reassignment of the patent under certain conditions. On January 17, 1938, Oppenheimer, for the recited consideration of One Dollar, signed a single page written agreement, termed, "Assignment", which was recorded in the United States Patent Office in accordance with patent law requirements. The agreement of October 20, 1937 was referred to in this instrument. The provision covering licensing is contained in Paragraph 11 of the Oppenheimer-Comfy agreement and it reads:

> "Comfy shall have the right to grant unto other non-exclusive, nonassignable licenses to make and sell such slip covers, but all such licenses shall be subject to the terms of the agreement and Comfy shall be responsible for payment unto Oppenheimer by such licensees the royalties mentioned in Paragraph 4 herein."

The Government contends that because of this provision Comfy had no power to grant an "exclusive license" to Sure-Fit when it entered into the agreement with Sure-Fit; the power was given to Comfy and the rights to Sure-Fit because of Oppenheimer's joinder in the latter agreement, which to that extent abrogated the October 20th Oppenheimer-Comfy agreement. The defendants take the position that the assignment by Oppenheimer to Comfy was effected by the agreement of January 17, 1938, the "Assignment" which is recorded, and not by the prior agreement.

With this I cannot agree. As between the parties, the statutory requirement of recording is of no consequence. Where there are no intermediary interests affected, recordation has no bearing on the results of a suit; *Hook v. Hook and Ackerman*, 187 F. 2d 52 (C. C. A. 3, 1951). No particular form is required for the assignment of a patent interest and patent assignments are subject to the same rules of construction that apply to contracts generally, the intention of the parties being of primary concern in construing them; *Crosley Radio Corporation v. Dart*, 160 F. 2d 426 (C. C. A. 6, 1947). The agreement of January 17, 1938 does not stand alone; the defendants cannot be heard to say that the limitation on licensing is without effect any more than they could avoid the paying of royalties by using the same reasoning. The only remaining question is the effect of the limitation on licensing. As part of the agreement between Oppenheimer and Comfy it must be given effect; does this, however, have the effect of reducing Comfy to something less than an assignee? I think not. *Waterman v. Mackenzie*, 138 U. S. 252, the leading case on the subject of patent assignments and licenses, establishes the principle that the "exclusive right to make, use and vend the invention or discovery" is one entire thing and cannot be divided by law. "The patentee or his assigns may, by instrument in writing, assign, grant or convey, either (1) the whole patent, comprising the exclusive right to make, use and vend an invention throughout the United States; or (2) an undivided part or share of that exclusive right; or (3) the exclusive right under the patent within and throughout a specified part of the United States. . . . Any assignment or transfer, short of one of these, is a mere license. . . ." The case also points out that whether the interest transferred is an assignment, or a license, does not depend upon the name by which it is called, but upon the legal effect of its provisions. There is no limitation that an assignment must be made in or by one written instrument. An assignment is not invalidated because there is a reserva-

tion of royalty; *Rude v. Westcott*, 130 U. S. 152; and, *Evans v. Kavanagh*, 86 F. Supp. 535 (D. C. E. D. Mich. 1949) held a transfer of patent rights to be an effective assignment even though it was coupled with a licensing back provision with the power to assign such license to one other person. I think that although the provisions of the Oppenheimer-Comfy agreement may be one step more removed than the Evans case, it is still within the doctrine of the Waterman case. Comfy is therefore an assignee. Thus, when viewed as a whole, as indeed it should be under *United States v. Patten*, 226 U. S. 525, the Court notes here a situation where no one, the patentee, the assignee, or the licensee, can create any rights under the patent in any other person without the consent of the other two. The owner of the patent and the two dominant manufacturers in the trade have so bound themselves. Although these facts are not identical with those in *United States v. Besser Mfg. Co.*, 96 F. Supp. 304 (1951), affirmed 343 U. S. 444, I think the evil which the court there struck down exists here, namely, (1) the veto power over licensing rights granted to a licensee and (2) the contractual arrangement which created the power to restrict competition by requiring joint consent before others could be licensed.

From what has been said before, it is clear that all of the parties hereto, including Oppenheimer and Katzner, were actively engaged in a conspiracy to assure continued domination of the slip cover market in the United States. Katzner, as various exhibits disclose, was closely associated with almost every action taken to effectuate the conspiracy and was particularly active in the maintaining of retail prices. Oppenheimer's activities in the conspiracy were not nearly as pronounced as that of the other five defendants but nevertheless formed a necessary part of the whole. He readily acquiesced in reduction of patent royalties whenever necessary to end litigation which would determine the validity of the patent. Furthermore, he contributed to the legal expenses involved in the harassing

suits and in one instance contributed substantially toward defendant Rosner's legal fees to avoid a real test of his own patent.

The assertion of the defendants that in granting this motion the Court is depriving them of the opportunity of establishing by way of defense the factual defenses alluded to before including the statement "that any patent infringement suits threatened or brought by the defendants against retailers and manufacturers were not threatened or brought for the purpose of harassing competitors" is without merit. No defendant has denied the doing of the acts of which there is documentary proof in the record. No defendant has undertaken to deny the existence of expressed attitudes in letters between themselves which reflect their respective understandings of the agreement. The attitudes referred to in the preceding statement cover maintenance of retail prices; threats of patent infringement suits to keep competitors from doing business with large establishments such as Sears Roebuck and Company and Montgomery Ward and Company; the advisability of suing retailers only; the advisability of settling suits to avoid the ultimate test of the worth of the patent, its validity; and the payment of attorneys' fees of their competitors in the industry. With every document admitted as genuine, it would be futile for for the defendants at this late date to attempt to explain away the contents of documents which so clearly express the actual business transactions of the respective defendants.

CONCLUSION

That the defendants in combination controlled the market and had the ability to and did drive competitors from the business of manufacturing knitted fabric slip covers is abundantly clear from the record. That the defendants in combination fixed and maintained prices is likewise crystal clear. That the defendants in combination and cross-licensing created a situation in the industry which, particularly by agreement for joint action respecting

the patents, effectively hindered newcomers in the field, is also established beyond peradventure of doubt. That the harassing suits against competitors, previously discussed in some detail, were designed as and were actually only harassing suits is clear from an examination of the correspondence between the parties and the Court feels that such conclusion is inescapable from an objective analysis of the documents. All of these actions taken in concert constitute a clear violation of the Sherman Antitrust Act and the Government has established to the satisfaction of the Court that the combination and conspiracy above referred to represents an unreasonable restraint of trade and commerce among the several states of the United States in the manufacture and sale of ready-made furniture slip covers, is unlawful, and in violation of Section 1 of the Sherman Antitrust Act. Further, the Government, in the opinion of the Court, has effectively demonstrated that the defendants combined and conspired not only to restrain trade unreasonably but also to monopolize trade and commerce among the several states of the United States in the manufacture and sale of ready-made furniture slip covers, in direct violation of Section 2 of the Sherman Antitrust Act. The Court also feels that by documentary proof the Government has established that the defendants have used patent rights unlawfully in instituting, effectuating and maintaining the aforesaid combination and conspiracy which likewise constitutes a clear violation of the Sherman Antitrust Act.

Since the Court holds that the Government is entitled to relief, the question as to the extent of the relief required to eliminate the practices complained of will require further consideration by the Court. The Government will present a proposed form of decree within 40 days from the date of this opinion to which the defendants may file objections or exceptions within 20 days thereafter. The Court will then hold an open hearing as to the form of the decree to be finally entered and thereafter will issue its final order.

Final Judgment.

This cause came on for hearing before the Court upon the motion by the plaintiff pursuant to Rule 56 of the Federal Rules of Civil Procedure for summary judgment in its favor, counsel for the parties having been heard and the Court having determined upon consideration of the pleadings, the admissions, and exhibits on file, that there is no genuine issue between the parties as to any material fact, and the Court having filed its opinion herein on July 30, 1956 granting the motion by plaintiff for summary judgment against all the defendants;

NOW, THEREFORE, after hearing plaintiff and defendants by their attorneys, it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

I

(A) "Defendants" means each and all of the parties defendants as named in the complaint in this cause;

(B) "Slip cover" means any ready-made furniture slip cover except such covers as are sold in several separate pieces and assembled by the user on chairs, sofas, davenports and the like (commonly designated as DO-IT-YOURSELF-KITS);

(C) "Person" means any individual, corporation, partnership, association or other business or legal entity;

(D) "Patents" means all United States Letters-Patent relating to the manufacture, use or sale of slip covers.

II

The provisions of this Final Judgment applicable to any defendant shall apply to such defendant, its or his officers, agents, servants, employees and attorneys, and to

all other persons acting or claiming to act under, through or for such defendant who shall have received actual notice of this Final Judgment by personal service or otherwise.

III

Defendants have violated Sections 1 and 2 of the Act of Congress of July 2, 1890, 15 U. S. C., Sections 1 and 2, entitled "An act to protect trade and commerce against unlawful restraints and monopolies", commonly known as the Sherman Act. Said violations have consisted of defendants engaging in an unlawful combination and conspiracy in restraint of trade and commerce in the manufacture and sale of slip covers, entering into unlawful contracts, agreements and understandings in restraint of said trade and commerce and unlawfully combining and conspiring to monopolize said trade and commerce in the manufacture and sale of slip covers.

IV

The agreement among defendants, dated October 4, 1938, and all agreements supplementary and amendatory thereto are adjudged and decreed to be unlawful and are hereby terminated; and defendants are jointly and severally enjoined and restrained from the further performance or enforcement of any of the provisions of said agreement or the agreements supplementary and amendatory thereto.

V

Defendants are jointly and severally enjoined and restrained from combining or conspiring, or from entering into, adhering to, performing, maintaining, furthering, directly or indirectly, or claiming any rights under any contract, agreement, understanding, plan or program with any other person to:

(A) Fix, maintain or adhere to the price of slip covers sold to third persons, except as provided by the "Miller-Tydings" and the "McGuire" Acts and the "Fair Trade" Laws of any State or Commonwealth;

(B) Monopolize or attempt to monopolize the manufacture, distribution or sale of slip covers.

VI

Defendants are jointly and severally enjoined and restrained from:

(A)(1) Purchasing slip covers manufactured by any other person and disposing of such slip covers in such a way as to disclose the identity of the manufacturer thereof, or (2) reselling such slip covers at prices less than wholesale and thus or otherwise disrupting the market of the manufacturer of such slip covers or creating the impression among retailers or consumers that such slip covers are of inferior quality or workmanship;

(B) Making or causing to be made false, derogatory or disparaging statements concerning slip covers manufactured by others or false statements concerning the financial ability of any other manufacturer of slip covers;

(C) Granting to any retailer of slip covers special discounts, advertising allowances or return privileges which are not available to others on proportionately equal terms;

(D) Entering into any contract or understanding with a retailer of slip covers obligating the latter to carry exclusively slip covers manufactured by the defendant, or not to carry or deal in slip covers manufactured by others. However, this provision shall not apply to an agreement with the owner of an individual store in any city having a population (based on the last official Decennial Census) of less than 25,000 inhabitants;

(E) Entering into or enforcing any contract or understanding with any supplier of materials for slip covers obligating such supplier to refrain from manufacturing for or selling to others any such materials, except that such defendant may contract for certain fabrics and fabrics

containing certain designs or patterns for the exclusive use of the defendant;

(F) Purchasing jointly with any defendant, from any other manufacturer of slip covers, machinery usable in the manufacture of slip covers.

VII

Defendants are jointly and severally enjoined and restrained from:

(A) Instituting or threatening to institute, or maintaining or continuing any action or proceeding for acts of infringement or use, or to collect damages, compensation or royalties alleged to have occurred or accrued prior to the date of this Final Judgment, under any patents owned or controlled by any defendant, except by way of setoff or counterclaim in any action brought by any third party against any defendant or defendants;

(B) Instituting, threatening to institute or maintaining any action or proceeding for acts of infringement or use of any patent owned or controlled by such defendant against any retailer of slip covers who is not also the manufacturer of the alleged infringing slip covers;

(C) Sharing with any other defendant expenses resulting from any action or proceeding for acts of infringement or use of any patent owned or controlled by any defendant;

(D) Instituting or threatening to institute any action or proceeding attacking the validity or scope of any patent for the purpose or with the effect of harassing a competitor or owner of said patent, except by way of defense, setoff or counterclaim in any action brought by any third party against any or all defendants.

VIII

This Court having found that the defendants have used patent rights unlawfully in instituting, effectuating and maintaining the illegal combinations and conspiracies and that defendants instituted and threatened to institute harassing infringement suits against competitors and retailers of slip covers, and in order to prevent such misuse of patent rights and the institution of such harassing infringement suits in the future;

(A) Each defendant is ordered and directed, in so far as it has the power to do so, to grant to any applicant therefor a nonexclusive license under any, some or all of the patents owned or controlled by such defendant at the date of entry of this Final Judgment or which are applied for or issued to or owned by such defendant within five (5) years from such date of entry, and defendants are each enjoined and restrained from making any sale or other disposition of any of the aforesaid patents which deprives such defendant of the power or authority to grant such licenses, unless such defendant sells, transfers or assigns such patents and requires, as a condition of such sale, transfer or assignment, that the purchaser, transferee or assignee shall observe the requirements of Sections VIII and IX of this Final Judgment with respect to the patents so acquired, and the purchaser, transferee or assignee shall file with this Court, prior to consummation of said transaction, an undertaking to be bound by the provisions of said Sections with respect to the patents so acquired;

(B) Each defendant is enjoined and restrained from including any restriction or condition whatsoever in any license or sublicense, as the case may be, granted by it pursuant to the provisions of this Section except that (1) the license may be made nontransferable, (2) a reasonable nondiscriminatory royalty may be charged; (3) reasonable provisions may be made for periodic inspection of the

books and records of the licensee by an independent auditor or any person acceptable to the licensee who shall report to the licensor only the amount of the royalty due and payable; (4) reasonable provision may be made for cancellation of the license upon failure of the licensee to pay the royalty or to permit the inspection of its books and records as hereinabove provided; (5) reasonable provision may be made for marking the slip covers manufactured, used or sold by the licensee under the license with the numbers of the licensed patents covering such slip covers; and (6) the license shall provide that the licensee may cancel the license at any time by giving 30 days' notice in writing to the licensor;

(C) Upon receipt of a written request for a license or sublicense, as the case may be, under the provisions of this Section VIII, such defendant shall advise the applicant in writing of the royalty which it deems reasonable for the future patents to which the request pertains. If the parties are unable to agree upon a reasonable royalty within 60 days from the date such request for the license was received by such defendant, the applicant therefor may forthwith apply to this Court for the determination of a reasonable royalty, and the defendant shall, upon receipt of notice of the filing, or upon the filing, of such application, promptly give notice thereof to the Attorney General. In any such proceeding the burden of proof shall be on the defendant to establish the reasonableness of the royalty requested, and the reasonable royalty rates, if any, determined by this Court shall apply to the applicant and all other licensees under the same future patents. Pending the completion of negotiations or any such proceeding, the applicant shall have the right to make, use and vend under the future patents to which its application pertains without payment of royalty or other compensation as above provided, but subject to the provisions of subsection (D) of this Section VIII;

(D) Where the applicant has the right to make, use and vend under any patents pursuant to subsection (C) of this Section VIII, said applicant or the defendant may apply to this Court to fix an interim royalty rate pending final determination of what constitutes a reasonable royalty. If this Court fixes such interim royalty rate, the defendant shall then issue and the applicant shall accept a license or, as the case may be, a sublicense, providing for the periodic payment of royalties at such interim rate from the date of the filing of such application by the applicant. If the applicant fails to accept such license or fails to pay the interim royalty in accordance therewith, such action shall be ground for the dismissal of his application, and his rights under subsection (C) shall terminate. Where an interim license or sublicense has been issued pursuant to this subsection, reasonable royalty rates, if any, as finally determined by this Court shall be retroactive for the applicant and all other licensees under the same future patents to the date the applicant files his application with this Court;

(E) Nothing herein shall prevent any applicant from attacking in the aforesaid proceedings or in any other controversy the validity or scope of any of the future patents nor shall this Final Judgment be construed as importing any validity or value to any of said future patents.

IX

Immediately following the entry of this Final Judgment, the defendants shall mail one copy of this Final Judgment to each person with whom any of them has or had a license agreement under any patent or patents to which Section VIII of this Final Judgment may apply, to each applicant who has in writing heretofore applied for and has not received a license to manufacture, use or sell slip covers under said patent or patents, and to each person against whom any of them has, with regard to slip covers,

ever instituted or threatened in writing to institute an infringement suit under any of these patents. Defendants shall in addition, within 60 days following the entry of this Final Judgment, cause a notice of the entry of this decree and a summary of its provisions to be inserted in the principal trade journal of the slip cover industry, which notice shall run for two consecutive issues, shall be no less than one-half page in size, and shall be in a form approved by the Attorney General of the United States. Should the defendants and the Attorney General be unable to agree within 30 days from the date of this decree as to the form of such notice to be inserted, each party shall at that time submit to the Court a form of proposed insertion and the Court shall then determine its content. Within 30 days following the first insertion of the notice in said trade paper, the said defendants shall file with this Court a verified statement setting forth the steps taken to comply with the above requirements of this Section IX.

X

For the purpose of securing compliance with this Final Judgment and for no other purpose, duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to any defendant, made to its or his principal office, be permitted, subject to any legally recognized privilege, (1) access during the office hours of said defendant to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of said defendant relating to any matters contained in this Final Judgment, and (2) subject to the reasonable convenience of said defendant and without restraint or interference from it to interview officers or employees of said defendant, who may have counsel present, regarding any such matters; and (3) upon request the defendant shall submit such reports in writing to the Depart-

ment of Justice with respect to matters contained in this Final Judgment as may from time to time be necessary to the enforcement of this Final Judgment. No information obtained by the means provided in this Section shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of such Department, except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

XI

Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification or termination of any of the provisions thereof, for the purpose of the enforcement of compliance therewith and for the punishment of violations thereof.

XII

Judgment is entered against defendants for all costs to be taxed in this proceeding.

Dated: March 14, 1957

/s/ THOMAS J. CLARY,
United States District Judge.

Order.

AND NOW, to wit, this 3rd day of May, 1957, upon consideration of the motion for relief from judgment under Rule 60 filed by defendants, Samuel Krasnov and Seymour Krasnov, to correct the Final Judgment entered in this matter on March 14, 1957, so as to delete therefrom, defendant Joseph A. Krasnov, who died on February 16, 1957, on the ground that the action did not survive against him, the final decree having been entered subsequent to his death; briefs submitted and oral argument had thereon, and it appearing to the Court that while it has the right to enter its Final Judgment nunc pro tunc as of a date prior to said death of party defendant, since its decision filed July 30th, 1956 found generally in favor of the plaintiff and against all of the defendants, such action is unnecessary in view of the determination by the Court that under Federal law (Common and Statute) and Pennsylvania law (Common and Statute) the action is a continuing one which did not abate by reason of the death of defendant Joseph A. Krasnov before the entry of Final Judgment, it is

ORDERED, ADJUDGED AND DECREED that the motion to delete from the Final Judgment entered the name of the defendant Joseph A. Krasnov be and it is hereby DENIED.

By THE COURT:

/s/ THOMAS J. CLARY, *J.*

Order.

And Now, to wit, this 10th day of May, 1957, upon consideration of the Motion for Relief from Judgment filed by Fannie Krasnov, Emanuel O. Munzer, and L. Arthur Greenstein, Executors of the Will of Joseph A. Krasnov, deceased, to correct the Final Judgment entered in this matter on March 14, 1957, so as to delete therefrom, defendant Joseph A. Krasnov, who died on February 16, 1957, on the ground that the action did not survive against him, the final decree having been entered subsequent to his death, it appearing to the Court that while it has the right to enter its Final Judgment nunc pro tunc as of a date prior to said death of party defendant, since its decision filed July 30, 1956 found generally in favor of the plaintiff and against all of the defendants, such action is unnecessary in view of the determination by the Court that under Federal law (Common and Statute) and Pennsylvania law (Common and Statute) the action is a continuing one which did not abate by reason of the death of defendant Joseph A. Krasnov before the entry of Final Judgment, it is.

Ordered, Adjudged and Decreed that the motion to delete from the Final Judgment entered the name of the defendant Joseph A. Krasnov be and it is hereby Denied.

By THE COURT:

/s/ Thomas J. Clary, *J.*

APPENDIX B.

Sherman Act, Section 1
(prior to 1955 Amendment)

Every contract, combination in the form of trust o otherwise, or conspiracy, in restraint of trade or commerc among the several States, or with foreign nations, is de clared to be illegal: *Provided*, That nothing contained i sections 1-7 of this title shall render illegal, contracts o agreements prescribing minimum prices for the resale of commodity which bears, or the label or container of whic bears, the trade mark, brand, or name of the producer o distributor of such commodity and which is in free an open competition with commodities of the same genera class produced or distributed by others, when contracts o agreements of that description are lawful as applied t intrastate transactions, under any statute, law, or publi policy now or hereafter in effect in any State, Territory, o the District of Columbia in which such resale is to be mad or to which the commodity is to be transported for suc resale, and the making of such contracts or agreements sha not be an unfair method of competition under section 45 o this title: *Provided further*, That the preceding provis shall not make lawful any contract or agreement, provid ing for the establishment or maintenance of minimum resal prices on any commodity herein involved, between manu facturers, or between producers, or between wholesaler or between brokers, or between factors, or between retailer or between persons, firms, or corporations in competitio with each other. Every person who shall make any co tract or engage in any combination or conspiracy declare by sections 1-7 of this title to be illegal shall be deeme guilty of a misdemeanor, and, on conviction thereof, sha be punished by fine not exceeding $5,000, or by imprison

ment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647 § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693, 15 U. S. C. A. § 1.

Sherman Act, Section 2

(prior to 1955 Amendment)

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 2, 26 Stat. 209, 15 U. S. C. A. § 2.

Sherman Act, Section 4

The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1-7 of this title; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. July 2, 1890, c. 647, § 4, 26 Stat. 209; Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167, 15 U. S. C. A. § 4.

Expediting Act, Section 2

In every civil action brought in any district court o the United States under any of said Acts, wherein th United States is complainant, an appeal from the final judg ment of the district court will lie only to the Supreme Court Feb. 11, 1903, c. 544, § 2, 32 Stat. 823; Mar. 3, 1911, c. 231 § 291, 36 Stat. 1167; June 9, 1944, c. 239, 58 Stat. 272; Jun 25, 1948, c. 646, § 17, 62 Stat. 989, 15 U. S. C. A. § 29.

Rule 56.

Summary Judgment.

(a) *For Claimant.* A party seeking to recover upon claim, counterclaim, or cross-claim or to obtain a declara tory judgment may, at any time after the expiration of 2 days from the commencement of the action or after servic of a motion for summary judgment by the adverse party move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. A amended Dec. 27, 1946, effective March 19, 1948.

(b) *For Defending Party.* A party against whom claim, counterclaim, or cross-claim is asserted or a de claratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgmen in his favor as to all or any part thereof.

(c) *Motion and Proceedings hereon.* The motion shal be served at least 10 days before the time fixed for th hearing. The adverse party prior to the day of hearin may serve opposing affidavits. The judgment sought shal be rendered forthwith if the pleadings, depositions, an admissions on file, together with the affidavits, if any, sho that there is no genuine issue as to any material fact an that the moving party is entitled to a judgment as a mat ter of law. A summary judgment, interlocutory in cha acter, may be rendered on the issue of liability alone al

though there is a genuine issue as to the amount of damages. As amended Dec. 27, 1946, effective March 19, 1948.

(d) *Case Not Fully Adjudicated on Motion.* If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) *Form of Affidavits; Further Testimony.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

(f) *When Affidavits Are Unavailable.* Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) *Affidavits Made in Bad Faith.* Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

28 U. S. C. A. Federal Rules of Civil Procedure, Rule 56.

APPENDIX C.

Quotations From Pretrial Proceedings.

Pretrial Proceedings pp. 152-154.

"The Court: . . . We have been delayed in having our pretrials because of counsel engagements and otherwise and because of engagements of the court. Now, if I misstate the purpose of these pretrials, correct me. My understanding was that we were to consider only documents and I was to pass on their apparent relevancy; is that right?

Mr. Tubridy: So I understand, sir.

Mr. Swain: Yes, sir.

The Court: And that at a later date, if we can eliminate some of them, and I am convinced that they should be eliminated, they are out of the case for all purposes, but that later on when we come to the real trial of the case, the other side are not completely foreclosed from raising further objections.

Mr. Tubridy: Oh, I wouldn't think that they could, sir. If they wanted to have a record for appeal purposes, they would be entitled to make that objection.

The Court: And therefore that my statement that I can see relevancy that would have some bearing on the Government's case is not binding in the event that counsel later make objections which I am then in a position to sustain.

Mr. Tubridy: That is my understanding completely.

Mr. Swain: Yes, sir, that is my understanding.

Mr. Rhoads: That is clearly my understanding also.

The Court: That was my understanding of the purpose of coming in here this morning, but I am a little bit confused

by some of the remarks of counsel. I thought that maybe I was actually trying the case, which I had no conception of doing when I came in here. That is why I wanted a little time to sort of orient myself and adjust myself.

Mr. Swain: Yes, sir, that is correct, and we will limit our objections to those which we think are quite patent and might eliminate some of the documents at this point.

Mr. Rhoads: May I say, sir, that I have understood exactly as Your Honor has understood, that this is really in the nature of a preliminary screening.

The Court: That is all I ever intended it to be, and I just wanted to make sure that the Government understood that and that the Government wasn't being led into a false position, because they are the ones that are most involved here, not the defendants."

• • •

Pretrial Proceedings p. 192.

"Mr. Rhoads: If Your Honor pleases, may I make an observation that might possibly be helpful? I have been sitting here in the capacity of one who is listening for the moment, but I was wondering whether, in view of the proceeding as it is developing here, it might not assist Your Honor from the point of view of time conservation if we would prepare for submission to the record a list of those documents as to which the objection of privilege is being raised by the defendants, and as to the others, recognize, for the sake of the state of the proceedings, if you will, that Your Honor will rule presently that they have at least the semblance of relevancy and you will not exclude them at this time, but at the same time we may later raise the proper objections as to relevancy, competency, and so forth, when they are offered in the trial of the case."

• • •

Pretrial Proceedings p. 194.

"The Court: . . . . This is thrown open for general discussion, because as I have seen this developing I agree with Mr. Rhoads that there is no sense in thumbing through these exhibits one after the other, because I have indicated the broad scope of my rulings, which is that I am eliminating nothing at this time unless it is clearly not relevant. . . . ".

Pretrial Proceedings pp. 200-201.

"The Court: Well, I have indicated to you gentlemen, after about four or five hours sitting in court here, what my reaction is to the exhibits that have been produced here, I will say generally that if admissible under any theory, they all seem to me—except the one that I rejected completely—every document here seems to have a bearing. My knowledge of the case is limited, naturally. I just know general contentions, broad outlines. I would say that I could have no criticism of the Government in presenting every one of these documents that I have seen up to now. At least I can see that it might be part of the mosaic, and if the rest of them are the same as those up to now, I don't see that there is any plethora of papers or exhibits in this case. It is too bad that there are so many, but maybe they are needed.

Mr. Swain: As I understand it, Your Honor's ruling, then, is that they are generally germane to the case.

The Court: That is all I am ruling.

Mr. Swain: However, they are subject to objections.

The Court: Every one of them is subject at the time when we sit down to finally try this case to a review by the court of its view now that they are germane to the issue. While all of this is part of a record, it is a preliminary record. There is going to come a day, and it probably won't be too far away, when this court will sit down to consider

this case. From that time on the real record in the case will be made. This hearing has given me a general idea of what the case is all about, which is important, but I may decide that we will probably have to try this case in stages anyway. I doubt if we could sit down and try it all the way through."

* * *

Affidavit of C. Brewster Rhoads Under Rule 56(f) on Behalf of Defendant, Sure-Fit Products Co.

STATE OF PENNSYLVANIA,
COUNTY OF PHILADELPHIA, } ss.:

C. BREWSTER RHOADS, being duly sworn according to law, deposes and says that he is attorney for Joseph A. Krasnov, Samuel Krasnov and Seymour Krasnov, trading as Sure-Fit Products Co. (and hereinafter collectively referred to as "Sure-Fit"), and that the following matters are true to the best of his knowledge, information and belief:

Insofar as the affidavits and exhibits thereto tendered by the plaintiff in support of its motion for summary judgment may be found admissible in evidence, and to the extent that defendant Sure-Fit may be advised at the close of plaintiff's case in regard to the need for introducing any evidence on behalf of defendant Sure-Fit, defendant Sure-Fit intends to prove, inter alia, the following:

1. With respect to the allegations of paragraph 10 of the Complaint that defendants have monopolized the slip cover industry:

a. In the setting of the annual sales-volume of the industry (unit-wise and dollar-wise) for a substantial period prior to the year 1937 and during the period 1937-1947, inclusive, and during the period 1949 to date, of

(i) slip covers of the kind covered by the Oppenheimer patent, and/or

(ii) other kinds of slip covers, namely, those not covered by the Oppenheimer patent,

the 1948 dollar-sales figures tendered by plaintiff's affidavits show that there was no monopoly or attempt to monopolize by defendants.

b. There has been freedom of entry into the market not in any way foreclosed or restrained by defendants, and there have been, during the period of the alleged monopoly, many a new entrant into the industry, proportionately greater than the number of entrants into many other industries during the same period.

c. The defendants did not have the power to control the market price in the industry, and there has been price competition between the defendants, Comfy and Sure-Fit, and also between these defendants on the one hand, and others in the industry on the other hand.

d. To whatever extent defendants, or either of them, have had any particular share of the slip cover market, that share has been the result of consumer demand responding to normal commercial stimuli, such as superiority of product, advertising, good will, reliability and other recognized factors resulting in market acceptance.

2. With respect to the allegations of subsections (d), (e) and (f) of paragraph 11 of the Complaint:

Any patent infringement suits threatened or brought by the defendants against retailers and manufacturers were not threatened or brought for the purpose of harassing competitors and their customers or suppressing competition in the manufacture and sale of slip covers or to discourage or prevent the manu-

facture of slip covers, and the accused slip covers involved in each of said threats and suits were in fact covered by one or more of the claims of the Oppenheimer patent.

3. With respect to the allegations of subparagraph (g) of paragraph 11 of the Complaint:

Neither defendant Comfy nor defendant Oppenheimer had anything whatsoever to do with any suits brought by defendant Sure-Fit, alleging invalidity of patents owned by others and/or alleging restraints of trade or violations of the antitrust laws of the United States by others; said suits were not brought for the purpose of harassing competitors or suppliers or eliminating or suppressing competition in the manufacture and sale of slip covers; and such suits lacked the capacity for effecting any such purpose or purposes as alleged in subsection (g) of paragraph 11 of the Complaint, since, insofar as such suits may have had any capacity to influence or affect competition, they would have invited or induced increased competition.

4. With respect to the allegations of subparagraph (h) of paragraph 11 of the Complaint:

Defendants did not cooperate to discourage the manufacture or sale of slip covers by others for the purpose of dominating and controlling the slip cover industry or for any other purpose, and the slip cover industry was never dominated or controlled by defendants or any of them.

5. With respect to the allegations of subparagraph (i)(1) of paragraph 11 of the Complaint:

Defendant Sure-Fit did not act in concert with defendant Comfy and/or defendant Katzner in purchasing slip covers of competitors from retailers, but on the contrary acted in competition with, and adversely

to, such other defendants, and defendant Sure-Fit did not resell such competitive slip covers to other retailers at less than the wholesale price in order to create the impression among retailers and consumers that such slip covers were of inferior quality and workmanship.

6. With respect to the allegations of subparagraph (i)(2) of paragraph 11 of the Complaint:

To the extent that defendant Sure-Fit may have granted discounts, advertising allowances and return privileges, it did not act in concert with defendant Comfy and/or defendant Katzner, but on the contrary acted in competition with, and adversely to, such other defendants, and defendant Sure-Fit, in granting any discounts, advertising allowances and return privileges, merely followed and met the long established practice of competitors throughout the industry.

7. With respect to the allegations of subparagraph (i)(3) of paragraph 11 of the Complaint:

Defendant Sure-Fit did not either in concert with defendant Comfy and/of defendant Katzner, or otherwise, make, or cause to be made, derogatory and disparaging statements concerning slip covers made by competitors or concerning competitors' financial ability to defend the retailer against infringement suits brought against the retailer by the defendants, though defendant Sure-Fit may have engaged in legitimate "sales puffing".

8. With respect to the allegations of subsection (j) of paragraph 11 of the Complaint:

Defendant Sure-Fit did not in concert with defendant Comfy and/or defendant Katzner require suppliers of materials for slip covers to agree to refrain from selling to competitors of defendant Sure-Fit as a

condition to said defendants purchasing from said suppliers.

9. With respect to the allegations of subparagraphs (a), (b) and (c) of paragraph 11 and with respect to the allegations of paragraph 12 of the Complaint:

While defendant Sure-Fit entered into a patent license agreement with defendant Comfy, dated October 4, 1938, and as exclusive licensee under said agreement properly contributed to the cost of certain patent infringement suits initiated by defendant Comfy against third parties, which patent infringement suits were settled, these activities, to the extent that any particular defendant participated in any act or acts, represented a lawful exercise by the defendants of their rights under the patent laws and not a combination or conspiracy violative of the antitrust laws or any other laws.

Defendant Sure-Fit cannot present by affidavit all the facts and details encompassed by the above offers of proof, as well as other facts and details which defendant Sure-Fit intends to offer upon the trial within the limitation first above set forth,* for the reason, inter alia, that such factual matters are voluminous and to a substantial extent in the possession of other parties, the interests of some of whom are adverse to this defendant.

/s/ C. BREWSTER RHOADS.
C. Brewster Rhoads.

Sworn to and subscribed before me this 19th day of December, 1955.

/s/ MARY M. TIERNEY,
Notary Public.

(Seal)

My Commission Expires: Feb. 23, 1957.

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* Namely, to the extent that defendant Sure-Fit may be advised at the close of plaintiff's case in regard to the need for introducing any evidence on behalf of defendant Sure-Fit.

Agreement of October 4, 1938.

THIS AGREEMENT made this 4th day of October, 1938, by and between THE COMFY MANUFACTURING Co., a Maryland corporation, hereinafter called "Licensor", and JOSEPH A. KRASNOV and SAMUEL KRASNOV, of Philadelphia, Pennsylvania, copartners doing business under the firm name of SURE-FIT PRODUCTS COMPANY, hereinafter called "Licensee":

WITNESSETH:

WHEREAS, the Licensor represents and warrants that it is the owner of United States patent No. 2,100,868, for Slip Cover for Furniture, dated November 30, 1937, issued to Arthur Oppenheimer, Jr.; and

WHEREAS, the Licensee is desirous of acquiring a license to make, use and sell the invention and improvements set forth in said Letters Patent.

NOW, THEREFORE, in consideration of the respective agreements, undertakings, warranties, covenants and stipulations of the parties herein contained, the Licensor and the Licensee hereby agree as follows:—

1) The Licensor does hereby grant unto the Licensee, a nonexclusive and indivisible license to make, use and sell the invention and improvements set forth in said Letters Patent.

2) The license granted by paragraph 1 shall be personal to the said Licensee, as a copartnership, and shall not be assignable by it, in whole or in part, excepting as hereinafter set forth, nor shall the individuals comprising said copartnership be entitled to any rights under said patent in their individual capacities, except as either may become the sole proprietor of the business which is now that of the

present copartnership, to which other partners may be admitted.

3) The Licensee agrees to pay unto the Licensor, a license fee or royalty of five cents (5¢) upon each and every chair cover delivered by the Licensee, and a license fee or royalty of ten cents (10¢) upon each and every sofa cover delivered by the Licensee, and coming within any of the claims of said Letters Patent.

4) The Licensee agrees that it will make payment of the said license fees or royalties unto the Licensor within twenty-five (25) days after each calendar month, on all deliveries made during the preceding calendar month, and that it will render unto Licensor, within the same time, a verified statement showing the total deliveries made during the preceding calendar month. Royalties paid on slip covers which are not accepted or which are returned for credit by Licensee's customers, shall be credited against further royalty payments to be made hereunder. For the purposes of the royalty payments required by foregoing paragraph 3 and the within paragraph 4, any statement rendered by Licensee to Licensor shall be conclusively presumed to be correct unless within seven (7) months after the rendering of such statement Licensor notifies Licensee in writing, by registered mail, of any alleged incorrectness, fully specifying the alleged errors claimed by Licensor.

5) The Licensee agrees that it will keep a separate sales record in which it shall enter all sales of slip covers coming within the terms of this license, which sales record shall be available to inspection and checking by an impartial certified public accountant of Pennsylvania appointed by the Licensor and at the latter's sole expense. Said certified public accountant, however, shall not make any copy of, nor disclose, the names and/or addresses of any of Licensee's customers and Licensee shall have the right to

have its own representative present throughout any inspection provided by the within paragraph 5.

6) Should infringements of the said Oppenheimer patent appear in the market, the Licensor and Licensee shall jointly determine whether or not suit should be instituted. All disbursements, costs and expenses in connection with such suits shall be subject to the joint determination of the Licensor and Licensee and all such disbursements, costs and expenses, before incurred, shall have the approval of both the Licensor and Licensee. In the event Licensor or Licensee does not approve of suit or of a particular disbursement, cost or expense, the other party may, in its discretion, at its own expense, proceed with such suit or expenditure. The disbursements, costs and expenses of such suit, when so approved, shall be borne equally by the Licensor and Licensee and any contribution by Arthur Oppenheimer, Jr. shall be credited to such disbursements, costs and expenses.

7) The Licensee agrees that it will offer the slip covers under said Letters Patent No. 2,100,868 to the trade for purchase as one of its regular products and to supply its salesmen with samples of same and to demonstrate the uses and advantages of such slip covers to the trade, and that it will fill the trade's demand for such slip covers.

8. (a) The license hereby granted by Licensor to Licensee is granted on the express terms and condition that Licensee's prices, terms and conditions of sale of the slip covers described and claimed in said patent shall, so long as such slip covers continue to be covered by said patent and so long as Licensee holds this license, be not more favorable than the prices, terms and conditions of sale fixed from time to time and followed by Licensor in making its sales, and the Licensee agrees to so maintain said prices, terms and conditions of sale as to such slip covers.

Licensor's prices, terms and conditions of sale as at present in force are those set forth in Schedule "A" hereto annexed and made a part hereof.

(b) The said Schedule "A" may be changed by the Licensor from time to time on reasonable notice in writing to the Licensee and, as changed, shall be binding upon Licensee within the provisions of foregoing section 8(a) and the following section 8(c), but not less than ten days' written notice shall be given before any change shall go into effect, and in any event, Licensor shall deliver such notice of change of prices, terms and conditions of sale before such changed prices, terms and conditions of sale are made known in the trade.

(c) It is, however, provided that Licensee may sell, but only in December and January, and in June or July, below the prices specified by Licensor, of any goods sold as a close-out, or as obsolete, or unseasonable items, as per Schedule "A" hereto annexed, but deliveries to be made not before December 25th or June 25th, and the purchasers thereof shall be required to offer and sell such merchandise in the months of January and July only;—provided, further, that Licensor will likewise not sell below its scheduled prices except as close-outs, obsolete, or unseasonable items, as provided in this paragraph.

9) The Licensee agrees that it will not assist others in an attack upon the said Letters Patent No. 2,100,868 as long as it holds this license.

10) In the event the Licensee fails to pay the royalties provided for in paragraph 3 hereof, and/or fails to supply unto the Licensor the verified statement referred to in paragraph 4 hereof, the Licensor may, at its option, cancel this license agreement upon twenty-five (25) days' written notice, fully specifying the alleged errors claimed by Licensor, sent by registered mail, addressed to the Licensee

at its address last known to the Licensor, and if such default is not remedied within the said twenty-five (25) day period, the said license shall automatically cease and terminate, but the Licensee, shall, nevertheless, be responsible to the Licensor for any license fees or royalties acruing to the Licensor under this agreement prior to its termination. If the default is remedied within said twenty-five (25) day period, then said notice of cancellation shall be deemed withdrawn and null and void.

11) The Licensor covenants and agrees that it will not grant unto others any right or license, express or implied, under the said Letters Patent as long as the Licensee holds this license, nor will Licensor sell such slip covers to slip cover manufacturers.

12) In the event that the Licensee is adjudicated a bankrupt, this license, upon such adjudication, shall forthwith cease and terminate, provided, however, that if the present Licensee re-enters the slip cover business after such bankruptcy, and this License is still in effect at the time of such bankruptcy, the Licensor will, upon demand by Licensee and the payment of Fifty Dollars ($50.00) to the Licensor, execute a new license to Licensee containing the identical terms and provisions of this agreement, provided such demand and payment are made within six (6) months from the adjudication in bankruptcy.

13) This license shall be assignable by the Licensee to any corporation, firm or partnership which succeeds to the Licensee's entire furniture slip cover business.

14) The Licensee agrees that it will not assert the Krasnov patent No. 1,984,973 against Licensor's knitted fabric slip covers as now made, and Licensee agrees that it will not assert the said Krasnov patent against such of Licensor's woven fabric slip covers having tying ends in the form of tapes or cords which are united or buckled

together from opposite sides of the slip cover, as may be sold by Licensor to any of ten (10) stores, which may include the mail-order part of the business of mail-order houses but may not include any chain store or any retail store of a mail-order house.

15) This license, unless otherwise sooner terminated under the provisions hereof, shall, at Licensee's option, be for the term of the Oppenheimer patent No. 2,100,868, subject to cancellation by Licensee at any time upon sixty (60) days' notice in writing to Licensor.

16) Upon the termination of this license in any manner and for any reason whatever, Licensee may, nevertheless, fill all orders for the licensed goods then on hand and may dispose of all manufactured goods and may also complete the knitted fabrics then on hand or on contract, providing that its right to so dispose shall be limited to one year from the date of notice of termination, and subject to all the terms and conditions, including the royalty payments, in this agreement provided.

17) Licensor hereby waives and forever releases any and all claim or claims which Licensor may have had or may now have against Licensee or against any of Licensee's customers on account of any alleged infringement of Oppenheimer patent No. 2,100,868 by the manufacture, sale or use of slip covers heretofore delivered or sold by Licensee.

18) Licensor hereby warrants that there are no licenses or shop rights or any other encumbrances outstanding with respect to or against Oppenheimer patent No. 2,100,868, other than the license agreement held by Licensor from the patentee Oppenheimer granting Licensor a license to manufacture, use, and sell the invention or improvement of the Oppenheimer patent and granting Licensor the right to sublicense under the Oppenheimer patent, and that no agreements or undertakings have been entered into with others,

whereby the Oppenheimer patent could not be asserted against others.

19) Each of the parties represents and warrants unto the other, that it is not either directly or indirectly or impliedly licensed under Fry patent No. 2,098,684, and that it does not hold any shop right under said Fry patent No. 2,098,684, nor any other immunity under or with respect to said Fry patent No. 2,098,684; and covenants and agrees, so long as this license, under the Oppenheimer patent, remains in force, not to become so licensed directly or indirectly or impliedly, nor to acquire any such shop right or other immunity with respect to said Fry patent No. 2,098,684, unless the other party is given the opportunity to become similarly licensed or vested with an identical license, shop right or immunity under or with respect to said Fry patent No. 2,098,684.

20) Licensee agrees, upon the execution of this license, forthwith to dismiss, without prejudice, its Bill of Complaint in Equity suit No. 86-233 heretofore filed by Licensee against Licensor and others in the Southern District of New York, as against The Comfy Manufacturing Co., Fred Katzner, Louis I. Katzner and Arthur Oppenheimer, Jr., and Licensor agrees, upon the execution of this license, forthwith to discontinue its counterclaim for patent infringement in said suit, Equity No. 86-233.

21) All notices under this agreement shall be in writing and no term or condition or undertaking set forth in this agreement shall be deemed in any way waived or modified unless such waiver or modification shall be in writing over the signature of the party against whom such waiver or modification is charged.

22) Licensor agrees, directly upon the execution of this agreement, to send or cause to be sent by first-class mail

to each and every person, firm and corporation who were at any time actually notified of Licensor's patent No. 2,100,868, either by Licensor's printed notice of December, 1937, or by letter, or any other means

a printed notice of a form and wording to be approved by Licensees, and on 8½" x 11" paper with typography to be approved by Licensee, announcing Licensee's license.

Directly upon the execution of this agreement, Licensor shall also deliver to Licensee a full, true and complete list of the names and addresses of all persons, firms and corporations who were at any time and in any manner actually notified of Licensor's patent No. 2,100,868, and will permit Licensee's representative to verify the printing and mailing of the notice to be sent by Licensor under the provisions of this paragraph.

23) Licensor represents and warrants that of even date herewith it has entered into an agreement with Arthur Oppenheimer, Jr., as per copy of same hereto annexed, and that it will not cancel or terminate the aforesaid agreement of even date with Arthur Oppenheimer, Jr. so long as the within agreement between Licensor and Licensee remains in force.

24) If this agreement be surrendered or cancelled at any time, neither this agreement or license, nor anything done pursuant thereto, shall be used against Licensee in any suit between Licensor and Licensee or between them and Arthur Oppenheimer, Jr.

25) This license agreement shall be binding upon and shall inure to the benefit of the legal successors and assigns of Licensor and also upon the legal successors and assigns of the patentee Oppenheimer.

In Witness Whereof, the Licensor, The Comfy Manufacturing Co., has caused this agreement to be executed in its name and its seal to be hereunto affixed by its officers

thereunto duly authorized, and the said Licensees, Joseph A. Krasnov and Samuel Krasnov have hereunto set their respective hands and seals, the day and year first above written.

THE COMFY MANUFACTURING CO.

By FRED E. KATZNER
Vice-President

J. BENJ. KATZNER (Secretary)

Attest:

C. W. FRECK

SURE FIT PRODUCTS CO.
JOSEPH A. KRASNOV
SAMUEL KRASNOV
individually and as copartners doing business under the firm name of Sure-Fit Products Company.

STATE OF NEW YORK }
COUNTY OF NEW YORK } *ss.:*

On this 4th day of October, 1938, before me personally came FRED E. KATZNER, to me known, who, being by me duly sworn, did depose and say that he resides in Forest Hills, Long Island, New York; that he is the Vice-President of THE COMFY MANUFACTURING Co., the corporation described in and which executed the foregoing instrument; that he knows the corporate seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed to said instrument by order of the board of directors of said corporation and that he signed his name thereto by like order.

VIRGINIA W. WAINMAN
NOTARY PUBLIC KINGS COUNTY

(Stamp illegible)

STATE OF PENNSYLVANIA }
COUNTY OF PHILADELPHIA } *ss.:*

On this 5 day of October, 1938, before me personally appeared JOSEPH A. KRASNOV and SAMUEL KRASNOV, to me known and known to me to be the individuals described in and who executed the foregoing agreement, and they severally acknowledged to me that they executed the same both in their individual capacities and as copartners doing business under the firm name of SURE-FIT PRODUCTS COMPANY.

FLOYD W. SHOCKLEY
Notary Public
My Commission Expires (Illegible)

SCHEDULE "A".

	Chairs	*Sofas*
Cloths not exceeding 8 ounces for 52 inch cloth—made without skirts or trimming	$1.85	$3.10
Close-out, obsolete and unseasonable items (paragraph 8(c))	$1.25	$1.90
Cloths not exceeding 9 ounces for 52 inch cloth—which includes skirts and novelty yarn cloth without skirts	$2.40	$4.15
Close-out, obsolete and unseasonable items (paragraph 8(c))	$1.85	$3.10
Cloths made with novelty yarns—or any printed or decorative effects including skirts	$3.00	$4.75
Close-out, obsolete and unseasonable items (paragraph 8(c))	$2.40	$4.15

Terms: 3/10 E. O. M.
No Consignment.
No returns.

No exchanges exceeding twenty-five (25) pieces from any one customer, in any calendar month, and not to exceed three hundred (300) pieces from any one customer, per calendar year.

Advertising: Allowances granted to a store must not exceed 5% of a store's total net shipments on knitted covers. Any amount granted must be on the condition that the customer contribute at least the same amount towards the advertising.

The undersigned hereby approves the foregoing agreement, and in consideration of the potential benefits and advantages which said agreement represents to the undersigned, the undersigned hereby agrees that any royalties paid by Sure-Fit Products Company to The Comfy Manufacturing Co., under the foregoing agreement, shall be deemed to have been paid to the undersigned and that any

termination or cancellation at any time prior to the expiration of patent No. 2,100,868, of the agreement entered into on the 20th day of October, 1937 by and between the undersigned and The Comfy Manufacturing Co. (under the authority of which agreement of October 20, 1937 the foregoing agreement was made by said The Comfy Manufacturing Co.) shall not in any way affect the rights of the Sure-Fit Products Company under the foregoing agreement and the foregoing agreement shall remain in full force and effect notwithstanding any such sooner cancellation or termination of said agreement of October 20th, 1937, excepting only that royalty reports and payments shall in such event be rendered and made directly to the undersigned.

ARTHUR OPPENHEIMER, JR.
Arthur Oppenheimer, Jr.

Witness:

VIRGINIA W. WAINMAN

Dated, October .., 1938.

STATE OF NEW YORK }
COUNTY OF NEW YORK } *ss.:*

On this 4th day of October, 1938, before me personally appeared ARTHUR OPPENHEIMER, JR., to me known and known to me to be the individual described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

VIRGINIA W. WAINMAN
NOTARY PUBLIC KINGS COUNTY
(Stamp illegible)

Office - Supreme Court, U.S.
FILED
AUG 3 3 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957.

No. 238.

SAMUEL KRASNOV, et al.,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From the United States District Court for the Eastern District of Pennsylvania.

BRIEF IN OPPOSITION TO MOTION TO AFFIRM.

C. Brewster Rhoads,
1421 Chestnut Street,
Philadelphia 2, Pa.,
Attorney for Appellants.

Of Counsel:
Joseph W. Swain, Jr.,
Montgomery, McCracken, Walker & Rhoads.

IN THE

Supreme Court of the United States.

October Term, 1957.

No. 238.

SAMUEL KRASNOV, ET AL.,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF IN OPPOSITION TO MOTION TO AFFIRM.

APPELLEE'S MOTION TO AFFIRM ESTABLISHES THE SUBSTANTIALITY OF THE QUESTIONS PRESENTED.

The substantiality of the questions discussed in the Jurisdictional Statement is evident from an examination of the Motion to Affirm.

1. On Motion for Summary Judgment, May Findings Be Made in Conflict With an Affidavit Under Rule 56(f)?

The Judisdictional Statement shows that the conclusion of the court below rests on a series of findings which appellants contend are in direct conflict with the Affidavit under Rule 56(f) filed on behalf of Sure-Fit. (Jur. St. pp. 18-19, 22-23, 27-28.) Appellee does not deny the existence of these conflicts but seeks to avoid their effect by urging that the Affidavit is a legal nullity. (Mot. Aff. pp. 16-17)

Of the three cases cited in support of appellee's posi tion, two, *Peckham v. Ronrico Corp.*, 7 F. R. D. 324 (U. S D. C. Puerto Rico, 1947), and *Shultz v. Manufacturer & Traders Trust Co.*, 30 F. Supp. 443 (U. S. D. C. W. D N. Y., 1939), held an affidavit under Rule 56(f) sufficien to prevent the entry of summary judgment until such tim as the party filing the affidavit had an opportunity to com forward with evidentiary material supporting the offer of proof contained in the affidavit.[1] Furthermore, in both of these cases the 56(f) affidavits did not specify the type of proof which the party opposing the motion intended to offer, whereas, the present Affidavit under Rule 56(f) set forth in detail the matters which appellants intended to prove in defense to the charges of the complaint.

When, in the *Peckham* case, in accordance with per mission granted by the district court in its ruling on the 56(f) affidavit, the party opposing the motion for summary judgment filed a further and more detailed affidavit, the Court of Appeals held that, while the further affidavit did not comply with Rule 56(e) since not made on personal knowledge, it amounted to an offer of proof and was effective to raise factual issues compelling the denial of the motion. *Peckham v. Ronrico Corp.*, 171 F. 2d 653 (C. A. 1st, 1948).

Appellee's tacit admission of the existence of conflict between the district court's crucial findings and the Affidavit under Rule 56(f), coupled with its failure to demonstrate the legal insufficiency of the Affidavit, shows that a substantial question is presented as to the propriety of the district court's foreclosure of trial by resolving factual issues on the motion for summary judgment.

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1. In the third case cited by appellee, *Sarkes Tarzian, Inc. v. United States*, 140 F. Supp. 863 (U. S. D. C. S. D. Ind., 1956) reversed on other grounds, 240 F. 2d 467 (C. A. 7th, 1957), an affidavit under 56(f) was found to be insufficient because it showed on its face that the evidentiary material referred to therein could have been produced by affidavit under 56(e).

2. On Motion for Summary Judgment, May Inferences Be Drawn in Favor of the Moving Party?

The Jurisdictional Statement points to several areas in which the district court made significant findings of fact by drawing inferences in favor of the appellee, the party moving for summary judgment, where equally acceptable inferences might have been drawn in favor of appellants, who opposed the motion. (Jur. St. pp. 19-20, 21.)

Appellee does not deny that the district court proceeded in this fashion. (Mot. Aff. p. 19.) It attempts to justify the district court's action by arguing that the procedure adopted was correct as a matter of law. Appellee's contention is that *legal* conclusions (described by appellee as "inferences") may be drawn from undisputed facts. The cases cited by appellee deal with situations of this type. They do not stand for the proposition that *factual* inferences, whether derived from disputed or undisputed underlying facts, may be drawn in favor of the moving party when equally acceptable inferences may be drawn in favor of the party opposing the motion. Indeed, all of the authority found is to the contrary. 6 *Moore's Federal Practice* (2d Ed. 1955) ¶ 56.15[3], p. 2125 (and cases there collected), ¶ 56.15[8], p. 2161.

A recent case categorically stating the rule is *Cochran v. United States*, 123 F. Supp. 362 (U. S. D. C. Conn., 1954), in which the court said at p. 364:

> "The evidential material and subordinate facts which they contain, however, do not lead to the conclusions claimed by the plaintiffs without the liberal drawing of favorable inferences from them. This is something the court cannot do in considering the mover's case in summary judgment."

Indeed, in one of the cases relied upon by appellee, *Associated Press, et al. v. United States*, 326 U. S. 1 (1945), the

district court, Judge Learned Hand, 52 F. Supp. 362 (U. S. D. C. S. D. N. Y., 1943), in entering summary judgment specifically rejected the request that he draw factual inferences in favor of the moving party, saying at p. 365:

> "We agree that, even though the by-laws were valid on their face, evidence, drawn from past practice, might be strong enough to justify the inference that they would be administered substantially as though they had not been changed; but we ought to make no such assumption upon a motion for summary judgment, for we should be deciding a controversial issue on which the defendants would have the right to a trial."

The type of inference which Judge Hand refused to draw is almost identical to one of the inferences drawn by the district court here, that the pricing provision of the agreement was followed in practice even though it was formally cancelled in 1942. (Jur. St. pp. 20-21.)

3. Is the License Agreement Lawful?

The Motion to Affirm makes it apparent that there is presented the important legal question whether a covenant not to grant further licenses is an appropriate method of granting an exclusive license or a provision illegal under the antitrust laws. Appellants read *Western Electric Co., Inc., et al. v. Pacent Reproducer Corporation, et al.*, 42 F. 2d 116 (C. C. A. 2nd, 1930) and *Paul E. Hawkinson Co., et al. v. Carnell, et al.*, 112 F. 2d 396 (C. C. A. 3rd, 1940) as expressly ruling that a covenant not to grant further licenses is an appropriate method of granting an exclusive license.

The covenant not to grant further licenses being equivalent to an exclusive license, it follows that the provision authorizing the licensee, Sure-Fit, to bring infringement suits if the licensor, Comfy, refused to do so is lawful.

An exclusive licensee may join with the patent owner in a suit for infringement, *Western Electric Co., Inc. et al. v. Pacent Reproducer Corporation, et al., supra,* or may require his licensor to join as an involuntary plaintiff. *Independent Wireless Telegraph Company v. Radio Corporation of America,* 269 U. S. 459 (1926); *Paul E. Hawkinson Co., et al. v. Carnell, et al., supra.*

Appellants have consistently maintained that the provision of ¶ 8(a) of the agreement of October 4, 1938 that Sure-Fit's prices shall ". . . be not more favorable than the prices, terms and conditions of sale fixed from time to time and followed by Licensor in making its sales. . ." (Jur. St. p. 59a) is lawful under *United States v. General Electric Co., et al.,* 272 U. S. 476 (1926). In its Motion to Affirm appellee (Mot. Aff. p. 24-25) contends that the further covenant in ¶ 8(c) (Jur. St. p. 60a) ". . . that Licensor will likewise not sell below its scheduled prices . . ." takes the agreement outside of the ambit of the *General Electric* case. The fallacy in this argument is twofold. First, the agreement did not bind "the licensor itself not to deviate from its prices" as stated by appellee. (Mot. Aff. p. 25.) Paragraph 8(b) of the agreement (Jur. St. p. 60a) specifically provides that the licensor may change its schedule of prices from time to time on reasonable notice to the licensee. Second, since the theory underlying the *General Electric* case is that the licensee may be prohibited lawfully from impairing his manufacturing licensor's market by underselling the licensor, that case does not justify the establishment by the licensor of prices for its licensee which are higher than the licensor's own prices. Consequently, where, as here, the licensee agrees to sell at prices stated on a schedule, represented to be the licensor's prices, the licensor must covenant to maintain those prices or the licensee in following the schedule will be required to make sales at prices higher than the licensor. The legality of such a requirement would be highly questionable.

The short answer to the Government's contention, however, is that a substantially identical provision[2] was contained in the General Electric license, and an identical contention[3] was made by the Government as to the illegality of that provision. This Court nevertheless found the agreement to be lawful.

4. May Injunctive Relief Be Granted Without a Demonstration of Its Necessity?

Appellee asserts that while there is nothing, either findings or discussion, in the district court's opinion which would justify the injunctive relief relating to trade practice contained in Sections VI (A)-(E) of the judgment (Jur. St. p. 35a), this Court should now examine the entire record to determine whether such relief was appropriate. Appellants do not conceive such examination to be the duty of this Court and suggest that where the relief is not remotely germane to the offenses determined by the district court to have taken place it should not be sustained.

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2. *United States v. General Electric Co., et al.*, October Term, 1926, No. 113, Transcript of Record p. 125:

"Similarly, the damages shall be determined by the Arbitrators in case of sales of lamps by the Licensor at prices lower or on terms and conditions more favorable to the purchaser than those established by the Licensor for sales by the Licensee, and, in the absence of evidence to the contrary, the damages shall be an amount equal to the total value, at the prices established under this agreement, of the lamps involved in each transaction."

3. *United States v. General Electric Co., et al.*, October Term, 1926, No. 113, Brief for United States p. 25:

"In the view of the Government this license agreement violates the Antitrust Act in three particulars:

* * *

"3. It obligates the licensor to sell lamps at the same price, and on the same terms and conditions as the licensee, and thus prevents the licensor itself from exercising a free judgment as to prices at which and terms and conditions according to which it shall sell its lamps."

5. Does a Suit by the United States Under the Antitrust Laws for an Injunction Abate on the Death of a Defendant?

Appellee does not deny that this is a question of first impression but argues that the question was correctly decided below. (Mot. Aff. pp. 30-31). In support of this contention Appellee cites treble damage cases in which, it is conceded, the action does survive the death of a party because it involves property rights. Appellee also relies on the proposition that generally suits in equity do not abate upon the death of a party. No recognition is made, however, of the more fundamental rule that "whether an action survives depends on the substance of the cause of action, not on the forms of proceeding to enforce it." *Schreiber v. Sharpless*, 110 U. S. 76, 80 (1883). On this principle, which accords with the fusion of law and equity accomplished by the Federal Rules of Civil Procedure, it generally has been held that suits involving property rights survive the death of a party, while those not involving such rights abate. See *Barnes Coal Corporation v. Retail Coal Merchants Ass'n., et al.*, 128 F. 2d 645, 649 (C. C. A. 4th, 1942); *Almour v. Pace*, 193 F. 2d 699, 700 fn. 2 (C. A. D. C., 1951). All of the cases relied upon by appellee are of the former type, i. e., involve property rights, but the present case is not.

The present action has abated as to Joseph A. Krastov because it does not involve property rights; *see Barnes Coal Corporation v. Retail Coal Merchants Ass'n., et al.; Almour v. Pace, supra;* is essentially penal in nature; *Schreiber v. Sharpless*, 110 U. S. 76 (1883); *Porter v. Montgomery*, 163 F. 2d 211 (C. C. A. 3rd, 1947); *Boucles v. Farmers Nat. Bank of Lebanon, Ky.*, 147 F. 2d 425 (C. C. A. 6th, 1945); and seeks injunctive relief against a dead man. See *Boucles v. Montgomery*, 66 F. Supp. 889, 891 (D. C. W. D. Pa., 1946), *aff'd.* 163 F. 2d 211 (C. C. A. 3rd, 1947).

CONCLUSION.

For the reasons set forth above, appellee's Motion to Affirm should be denied and the questions presented given plenary consideration.

Respectfully submitted,

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Nos. 238, 254, 255

In the Supreme Court of the United States

OCTOBER TERM, 1957

SAMUEL KRASNOV, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA

THE COMFY MANUFACTURING COMPANY AND FRED E. KATZNER, APPELLANTS

v.

UNITED STATES OF AMERICA

ARTHUR OPPENHEIMER, JR., APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MOTION TO AFFIRM

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In the Supreme Court of the United States

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No. 238

SAMUEL KRASNOV, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA

No. 254

THE COMFY MANUFACTURING COMPANY AND FRED E. KATZNER, APPELLANTS

v.

UNITED STATES OF AMERICA

No. 255

ARTHUR OPPENHEIMER, JR., APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MOTION TO AFFIRM

Pursuant to Rule 16, Paragraph 1 (c) of the Revised Rules of this Court, appellee moves that the judgment of the District Court be affirmed.

STATEMENT

These are direct appeals from a final judgment entered on March 14, 1957, by the District Court, adjudging that appellants had combined and conspired to restrain interstate commerce in the manufacture and sale of ready-made knitted furniture slip covers and had combined and conspired to monopolize such commerce, in violation of Sections 1 and 2 of the Sherman Act (15 U. S. C. 1, 2), and granting injunctive relief.

The complaint, filed on June 7, 1950, named six defendants: The Comfy Manufacturing Company ("Comfy"), the largest slip cover manufacturer; Fred E. Katzner, Comfy's president; Samuel, Seymour and Joseph Krasnov, partners doing business as Sure-Fit Products Company ("Sure-Fit"), the second largest firm in the industry; and Arthur Oppenheimer, Jr. ("Oppenheimer"), the patentee of a patent for manufacturing knitted slip covers. All of the defendants other than Joseph Krasnov are appellants before this Court. Joseph Krasnov died after the District Court had decided the case, but before entry of the decree, and his executors have been substituted for him and are among the appellants in No. 238 (see *infra*, pp. 30–32).

The proceedings below

On January 21, 1954, the United States moved for summary judgment, after pre-trial proceedings in which the genuineness of virtually all the documents in support of the motion had been admitted by at least one defendant. The motion was accompanied

by an affidavit, a compilation of some 500 of these documents, and court records. None of the defendants submitted any opposing affidavits (or documents) under Rule 56 (e) of the Federal Rules of Civil Procedure. However, on December 19, 1955, 23 months after the Government's motion for summary judgment had been filed, and the day before the motion was scheduled for argument, the Krasnov defendants filed an affidavit of their counsel under Rule 56 (f) stating what "defendant Sure-Fit intends to prove" at the trial (J. St. No. 238, p. 52a).

On July 30, 1956, the court granted the Government's motion. The court held that there was no genuine issue as to any material fact, that the Government "has established by the introduction of *documentary evidence* all of the facts necessary to establish its case" (*id.*, 19a), and that such evidence established the conspiracy and combination charged in the complaint. After further proceedings, the court on March 14, 1957, entered a decree awarding injunctive relief (*id.*, 33a–41a).

The facts

The factual statement which follows is based upon the documents, held by the court to be "relevant and admissible" (J. St. No. 238, pp. 7a, 20a), which the Government submitted in support of its motion for summary judgment, and upon which the court based its decision.

1. The Oppenheimer patent and its assignment to Comfy

On October 20, 1937, while Oppenheimer had pending an application for a patent covering the manufacture of ready-made furniture slip covers from knitted

fabrics, he agreed to assign all of his interest in the patent to Comfy (GX 475). He authorized Comfy "to grant unto others non-exclusive, non-assignable licenses" under the patent "subject to the terms of this agreement" (*id.* ¶ 11). Comfy agreed to pay royalties to Oppenheimer (*id.* ¶ 4), and Oppenheimer could reacquire the patent under certain conditions (*id.* ¶ 12, 18). On November 30, 1937, Oppenheimer was granted the patent. Pursuant to the October 20 agreement, he then executed a formal assignment of it to Comfy (GX 47[illegible]

Upon transfer of the patent, Comfy began to institute infringement suits. It did not proceed against manufacturers of allegedly infringing products (see GX 67–68), but decided that "it would be best to sue a store" (GX 68), primarily because of the known aversion of retailers to patent litigation (GX 73, 84). Comfy watched retail advertisements (GX 76, 77, 80), and its representatives visited stores to check for allegedly infringing products (GX 75, 80, 81). Upon discovering an alleged infringement, it demanded that retailers withdraw the infringing merchandise (GX 69, 76, 77, 81, 86; see GX 71), including with each demand newspaper accounts of suits already instituted against retailers (GX 71).

Some retailers withdrew competing merchandise (GX 79; see GX 81). However, Hecht Bros. of New York apparently failed to remove Sure-Fit's covers, and Comfy sued it in April 1938 for an injunction, damages, and accounting for profits (GX 87). The suit was dismissed without payment of damages (GX

89) when Hecht Bros. withdrew Sure-Fit's covers (GX 88) and, at Comfy's request (GX 90), wrote Comfy that the Sure-Fit product infringed the Oppenheimer patent and would not again be sold by Hecht Bros. (GX 90, 91). After the suit was settled, Comfy expressed the hope that "we will be able to get together with your store in the promoting of these Knitted Slip Covers" (GX 90).

Sure-Fit was aware of Comfy's suits against retailers selling Sure-Fit's products (GX 108). Its counsel stated that there was no "patentable invention in the Oppenheimer patent" and that "there is no possibility of the Oppenheimer patent's being sustained in any adequately contested case" (GX 105A). Sure-Fit demanded that Comfy cease threatening and suing its retail customers (GX 108). After Sure-Fit had "patiently waited" for Comfy to bring an infringe-

[1] At the same time, Comfy also sued Hutzler Brothers of Baltimore (GX 93). Comfy hoped that Hutzler would similarly settle the case by removing the offending merchandise, admitting the validity of the patent and the fact of its infringement (GX 95). Such a settlement, Comfy said, would be of "great benefit in the trade," especially since Comfy was then contemplating other suits against retailers and a manufacturer (GX 95; see GX 267). Instead, Hutzler challenged the validity of the patent (GX 93: Hutzler's Answer ¶ 10-14; Notice of Additional Defenses). Comfy regarded "the whole situation there" as "right ticklish" (GX 99), and after the case was set for trial (GX 102), it negotiated with Hutzler to discontinue the suit (GX 104; see GX 93). Hutzler, however, refused to admit the validity of the patent or the fact of infringement, and insisted that it would continue to purchase wherever it wished (GX 104). The suit was settled early in 1939 after Comfy had licensed Sure-Fit under the Oppenheimer patent (see GX 104, 93).

ment suit "directly against it as the manufacturer" (GX 108). Sure-Fit itself instituted suit in January 1938 against Comfy and Oppenheimer for a declaration that the Oppenheimer patent was void and for injunctive relief (GX 109). This suit was discontinued (GX 112) as a result of the agreement of October 4, 1938.

2. The Comfy-Sure-Fit Agreement of October 4, 1938

By this agreement (GX 1), Comfy gave Sure-Fit "a non-exclusive and indivisible license" under the Oppenheimer patent (¶ 1),[2] and agreed that it would "not grant unto others any right or license, express or implied," nor would it "sell such slip covers to" other manufacturers (¶ 11). The agreement also provided (¶ 6) that Comfy and Sure-Fit should "jointly determine" whether to institute patent infringement suits; that all expenses of such suits should, "before incurred," have the approval of both firms and "shall be borne equally by them"; and that, if either Comfy or Sure-Fit failed to approve a suit or a disbursement, "the other party may, in its discretion, at its own expense," proceed with the suit. Sure-Fit was required to sell its slip covers at prices and terms "not more favorable than the prices, terms and conditions of sale fixed" by Comfy (¶ 8 (a)). Comfy, in turn, bound itself not to "sell below its scheduled prices" (¶ 8 (c)).[3]

[2] Comfy also licensed Sure-Fit under another of its patents (GX 16), and Sure-Fit licensed Comfy under two of its patents (GX 1, ¶ 14; GX 17).

[3] Both parties could sell below scheduled prices "any goods sold as a close out, or as obsolete or unseasonable items" (¶ 8 (c)).

A document executed by Oppenheimer at the same time "approve[d] the foregoing agreement" between Comfy and Sure-Fit and waived certain rights "in consideration of the potential benefits and advantages which said agreement" represents to him (GX 1, p. 11). The Comfy-Sure-Fit agreement provided for "contributions" by Oppenheimer to the expenses incurred in infringement suits (GX 1, ¶ 6; see GX 2).

3. Infringement suits by Comfy and Sure-Fit

Following the agreement of October 4, 1938, Comfy and Sure-Fit embarked upon a course of patent litigation against both retailers and manufacturers of allegedly infringing slip covers.

a. Suits by Comfy against Retailers

Between 1938 and 1947, Comfy initiated ten suits against retailers. In general, they followed the pattern previously established by Comfy's suits against Hecht Bros. and Hutzler (*supra*, pp. 4–5). Representatives of Comfy would report on department stores selling slip covers manufactured by competitors (GX 140–41, 142, 240). After sending the retailer a notice that his sales of competing slip covers infringed the Oppenheimer patent and demanding discontinuance of such sales (*e. g.*, GX 115–120, 128, 147), Comfy would file suit (GX 148, 158, 170–72, 183, 191–92, 207–09, 224, 240–43) and give notice of the suit to the trade (GX 143, 149, 179, 295). Since retail stores are traditionally averse to any type of patent litigation (GX 137; see GX 73, 84), some stores would promptly remove the offending merchandise (GX 127,

130, 132).[4] None of the ten suits ever came to trial, for if the suits were set down for pre-trial (GX 231, 234–38), or if the defendant sought to contest the validity of the patent (GX 165, 168), Comfy would discontinue the suits (GX 150–56, 161A–D, 167–68, 173–78, 186–90, 202–04, 214–21, 244–49), ordinarily on condition that the supposedly infringing slip covers be removed (see GX 150–56, 174, 220, 247).[5]

b. Suits by Comfy and Sure-Fit Against Other Manufacturers

Nine days after the licensing agreement was signed in 1938, Comfy sued Med-Vogue Corp. for damages, profits, and an injunction for alleged patent infringement (GX 251). After Med-Vogue attacked the Oppenheimer patent (GX 252) and counterclaimed for damages for unfair competition from both Comfy and Sure-Fit (GX 252), Comfy discontinued the suit by stipulation (GX 254). Med-Vogue agreed to stop manufacturing knitted slip covers (GX 255, ¶ 1), and Comfy purchased part of its inventory and machin-

[4] One retailer removed a competitor's slip covers after discussion with a Comfy representative who reported (GX 139):

> Jack [representing the retailer] asked me to have you do him a personal favor—send Jack a letter advising him that in our opinion there is probable infringement and you may be forced to bring some action. Jack promised to pull the covers off sale with this excuse and send them all back.

[5] Comfy's first suit against Lit Brothers, a retailer, was settled when Lit Brothers agreed not to sell slip covers infringing the Oppenheimer patent (GX 174). When Lit Brothers subsequently sold slip covers manufactured by Vatco (*infra*, p. 9), Comfy's counsel recommended filing "a new suit" possibly "confined entirely to the breach of contract." "I believe this would be an excellent opportunity to litigate this situation *because the issue of validity, I believe, would be precluded by the agreement*" (GX 180). (Emphasis added.)

ery (GX 255, ¶ 6) and took over its customer accounts (GX 261–63). The $10,000 cost of disposing of the suit (see GX 255, Schedule B) was borne equally by Sure-Fit and Comfy (GX 256, see GX 260), after deducting Oppenheimer's $500 contribution (GX 482).

Comfy filed an infringement suit against Vatco Manufacturing Co. (GX 271) only after Vatco had notified the trade that the Oppenheimer patent was invalid, offered to guarantee its retail customers against infringement suits, and demanded that Comfy bring suit to settle once and for all the validity of the Oppenheimer patent (GX 265, 266). After the case had been placed on the trial calendar (GX 275–76), Comfy terminated it by an agreement releasing Vatco and its retail customers from all claims for damages and profits (GX 282). Vatco, however, refused to admit the validity of the Oppenheimer patent (GX 283).

On June 18, 1941, Comfy instituted an infringement suit for damages against Dyer-Gruen-Jackson (GX 296), a sub-licensee under a patent issued to one Fry (GX 294) a few weeks prior to the Oppenheimer patent. Comfy filed the action only after ascertaining that the defendant was financially weak (see GX 286, 288, 308), and, immediately after filing the complaint, Comfy's president stated that "[w]e may decide that this is the suit we will try" (GX 293). Quite unexpectedly, Louis Rosner, a manufacturer sublicensed under the Fry patent (GX 298, ¶ 3), was permitted to intervene in the case (GX 298–99), and asked the court to declare the Oppenheimer

patent invalid and enjoin Comfy from attacking Rosner's products (GX 301). After Rosner moved for summary judgment (GX 303) and served a subpoena upon Comfy's president (GX 304), the suit was discontinued. Comfy paid Rosner a substantial sum of money (GX 329, see GX 330), released him from paying damages to it (GX 330–31), and gave him a non-exclusive license under the Oppenheimer patent (GX 330, ¶ 2).[6] However, royalties payable under the license (GX 330, ¶ 4) were waived as to certain types of slip covers (GX 333a–d). This agreement was approved by Sure-Fit, on condition that its royalties to Comfy be reduced (GX 324), and by Oppenheimer (GX 331–32) who was advised at all times of the negotiations (GX 316, 317, 320, 325, 328) and contributed $1000 to the expenses incurred in the case (GX 330). The royalties paid by Rosner under the Oppenheimer patent license (GX 330, ¶ 4) were equally divided among Comfy, Sure-Fit and Oppenheimer (GX 340–41).[7]

During this period, Sure-Fit also brought suits against manufacturers. On October 22, 1938, it instituted a suit for a declaratory judgment that certain patents held by its competitor Med-Vogue Corporation were invalid (GX "X"). In 1941, two similar

[6] Rosner, however, refused to admit that the Oppenheimer patent was valid or that he had infringed it, and reserved the right subsequently to contest the patent (GX 330, ¶ 8).

[7] Comfy also filed an infringement suit in June 1942 against the Malden Novelty Co. (GX 343). The complaint was dismissed for want of jurisdiction over the defendant (GX 344–45); Comfy did not refile the suit in Massachusetts, where Malden was incorporated and did business (see GX 344).

suits were filed—one against Med-Vogue alone, and a second against Med-Vogue and another (GX "Y"). These three suits never came to trial, but remained on the docket until January 31, 1950, although in 1947 Sure-Fit had purchased all of Med-Vogue's machinery, equipment and good-will (GX 352–53),[8] and Mednick, its president, had agreed to stay out of the slip cover business (GX 352; see GX 365). The suits were simultaneously dismissed by Sure-Fit (GX "X", "Y", Stipulations of Dismissal) after the Department of Justice instituted the investigation leading to the present case (Transcript of Hearing on Motion for Summary Judgment, Dec. 20–21, 1955, p. 196).

4. Price-fixing by Comfy and Sure-Fit

Under the agreement of October 4, 1938, Sure-Fit agreed not to undersell Comfy and Comfy agreed to maintain its "scheduled prices."[9] Up to 1942, Comfy and Sure-Fit acted jointly in fixing prices (GX 22, 32; see GX 21). Thus, Comfy, in proposing a price reduction to Sure-Fit, said that it did not "want to do this unless it is agreeable to you" (GX 23), and Comfy's president at a later date asserted that he would shortly have the "opportunity to see Sure-Fit and discuss spring prices" (GX 32). Although the

[8] Sure-Fit and Comfy jointly shared the cost of this purchase (GX 356, 357) and Sure-Fit, at least, obtained "some excellent new accounts by the fact that Mednick is now out of business" (GX 358; see GX 359–60).

[9] A schedule of Comfy's prices was annexed to the agreement (§ 8 (a)). The schedule could be changed by Comfy upon reasonable notice to Sure-Fit, and such changed schedule was "binding" upon the latter (§ 8 (b)).

price-fixing clauses of the agreement were canceled in 1942 (GX 3), shortly thereafter a Sure-Fit customer who inquired as to Comfy's prices "of course, he found the prices in the same ranges and the same bracket" (GX 33).

During this period, Comfy and Sure-Fit acted jointly to maintain the resale prices charged by their customers (*e. g.*, GX 24–27). Thus, appellant Katzner wrote Sure-Fit in 1941 that "I will make every effort to have Mr. Heliof of Gimbel's in Pittsburgh raise their retail selling price on davenports" (GX 24), and Comfy asked Sure-Fit to see that two of its retail customers "agree to establish" certain resale prices (GX 26). After 1942, Comfy vigorously enforced the same policy as to its own retail customers. (GX 34–49, esp. GX 38, 41, 45).

Occasionally, Comfy and Sure-Fit deviated from the prices fixed by them. Comfy, however, concluded that "there was no real harm being done" by Sure-Fit's concessions, so long as "they were confined mostly to Sure-Fit's own customers." (GX 18a). But Sure-Fit's 20% discount to a Comfy customer was "an entirely different story" and a "violation" of the agreement.[10] "We must definitely understand each other that we cannot approach each other's accounts with inducements that violate the licensed [*sic*] agreement * * *. Unless we agree on the above, I can see no purpose in maintaining our licensed [*sic*] agreement with Sure-Fit, and believe we should take some immediate steps to correct this bad situation." (*Ibid.*)

[10] Sure-Fit likewise complained that Comfy had granted "concessions in excess of those provided by the contract" (GX 18).

5. Other anticompetitive activities of Comfy and Sure-Fit

Sure-Fit and Comfy gave special allowances and privileges to favored customers, since "we must both understand and agree that an occasional reduction in price or other inducement may be necessary because of some local situation or competition with non-licensed manufacturers" (GX 18a). Thus, Sure-Fit had "a special deal" (GX 400) for certain customers whose purchases "remain exclusively with us" (GX 395; see esp. GX 406; also GX 405, 407, 409).[11] It gave a "special rebate" (GX 438; see GX 439), allowed sales on consignment (GX 435), granted advertising allowances (GX 394, 395, 399–401, 403, 405, 408–09, 412–13, 417), paid the salary of a customer's employee whom Sure-Fit had trained (GX 415), and gave one customer "an exchange privilege which will be very costly to us" (GX 419), as well as return privileges to other customers (*e. g.*, GX 430, 431, 433, 434; see GX 426). Comfy, in return for exclusive dealing agreements (*e. g.*, GX 444–445, 454, 456), similarly gave favored customers (see GX 462) such preferences as advertising allowances (*e. g.*, GX 442, 444, 448, 460, 461), special exchange privileges (GX 444, 446, 451, 455), rebates (GX 446), and other contributions (GX 449, 453, 457). Such arrangements were to remain confidential because they were "contrary to the general policies of this company" (GX 442; see GX 445).

[11] These "deals" were "primarily intended for breaking into the larger accounts" (GX 393; see GX 413, 416, 417) and were not available to accounts with "low ratings" (GX 393).

Other practices shown by the record include contracting with suppliers not to sell supplies to competing manufacturers (GX 465), making disparaging statements about the products of competing manufacturers (GX 463), and purchasing slip covers of other manufacturers (in one instance at a loss, GX 388) and reselling them through retail outlets (GX 381, 385, 387; see also GX 384, 386, 388).

The District Court's decision

In holding that "the Government * * * has effectively demonstrated that the defendants combined and conspired not only to restrain trade unreasonably but also to moopolize trade and commerce * * * in the manufacture and sale of ready-made furniture slip covers" (J. St. No. 238, p. 32a), the District Court stated (*id.*, 19a) that the "undisputed documents," the genuineness of which was admitted, "show a conspiracy to restrain trade and monopoly, acts done in accordance with the conspiracy and harmful effects upon trade in the particular industry." The court pointed out (*id.*, 12a) that the October 4, 1938, agreement between Comfy and Sure-Fit—"the basic document of this conspiracy" (*id.*, 11a)—was entered into "at a time when the * * * validity of the Oppenheimer patent had not been determined and, in fact, after all parties concerned had clearly agreed never to permit judicial determination of its validity * * *," and that the defendants thereby "intended (and achieved)" "a deliberate division of the trade." The court held (*id.*, 32a) that the numerous infringe-

ment "suits against competitors * * * were designed as and were actually only harassing suits"; that the Government had established "by documentary proof" that the defendants "have used patent rights unlawfully in instituting, effectuating and maintaining the aforesaid combination and conspiracy" (*ibid.*); that it was "abundantly clear from the record" that "the defendants in combination controlled the market and had the ability to and did drive competitors from the business of manufacturing knitted fabric slip covers," and that it was "crystal clear" that they concertedly "fixed and maintained prices" (*id.*, 31a); and that the provisions in the October 4, 1938 agreement for price-fixing, cross-licensing of patents, and joint determination whether to institute infringement suits, "were well beyond the protection afforded by patent grants" (*id.*, 25a).

The court's decree, entered after a further hearing, cancelled the patent licensing agreement of October 4, 1938, and prohibited its performance or enforcement (J. St. No. 258, p. 34a). The court enjoined the defendants from "combining or conspiring," or otherwise agreeing "with any other person" to fix prices (except pursuant to "fair trade" laws), or to "monopolize or attempt to monopolize" the industry; from engaging in various restrictive trade practices, or from instituting or maintaining harassing patent suits (*id.*, 34a–36a); and directed the defendants to grant non-exclusive patent licenses at reasonable royalties, free from any "restriction or condition" except those authorized in the decree (*id.* 37a–39a).

ARGUMENT

1. The District Court correctly granted summary judgment in favor of the Government

Rule 56 (c) of the Federal Rules of Civil Procedure provides that summary judgment may be granted if the pleadings, depositions, admissions, and affidavits show that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." We submit that the District Court correctly held that there was no genuine issue as to any material fact, and that the Government was entitled to judgment as a matter of law.

A. In support of its motion for summary judgment, the Government filed an affidavit with more than 500 documents, the genuineness of which was admitted, and which the District Court held to be "relevant and admissible" (J. St. No. 238, pp. 7a, 20a). None of the defendants submitted any opposing affidavits under Rule 56 (e). However, 23 months after the Government's motion for summary judgment had been filed, and the day before the motion was to be argued, the Krasnov defendants filed, under Rule 56 (f), an affidavit by their attorney constituting an offer of proof of what Sure-Fit would show at the trial. The affidavit stated (*id.*, 56a) that Sure-Fit "cannot present by affidavit all the facts and details encompassed by the above offers of proof, as well as other facts and details which defendant Sure-Fit intends to offer upon the trial * * * for the reason, inter alia, that such factual matters are voluminous and to a substantial extent in the possession of other

parties, the interests of some of whom are adverse to this defendant."

That affidavit did not suffice to raise any factual issues which would require denial of the motion. Affidavits under Rule 56 (f) are required to set forth in detail the reasons why the affiant is unable to file evidentiary affidavits (*Peckham* v. *Ponrico Corp.*, 7 F. R. D. 324, 330 (D. Puerto Rico), reversed on other grounds, 171 F. 2d 653 (C. A. 1); *Schultz* v. *Manufacturers & Traders Trust Co.*, 30 F. Supp. 443 (W. D. N. Y.)), and what efforts have been made to obtain such evidence (see *Sarkes Tarzian, Inc.* v. *United States*, 140 F. Supp. 863, 867 (S. D. Ind.), reversed on other grounds, 240 F. 2d 467 (C. A. 7)). The Krasnov defendants had ample opportunity either to obtain affidavits or to take depositions or obtain discovery during the 23 months between the filing of the Government's motion and the submission of the attorney's affidavit.[12] The District Court there-

[12] The Krasnov appellants attempt to justify their belated filing of an attorney's affidavit on the ground that the District Court ruled at the pre-hearing conferences that the defendants would have an opportunity to object to the introduction of any of the documents before they became a part of the record, and that "[o]n several occasions the court indicated that the case was to be disposed of at trial rather than on the motion" (J. St. No. 238, p. 9; see pp. 28–29). However, as the District Court pointed out (*id.*, 7a), the pre-trial proceedings were held "[b]ecause of objections by the defendants to the consideration of the various documents" submitted by the Government in support of the motion, and the proceedings "were availed of to determine which of the exhibits were relevant and admissible." At the pre-trial conferences, the defendants objected to the admissibility of a number of the documents, and argued these objections at length (Transcript of Pre-trial Proceedings,

fore properly concluded (J. St. No. 238, p. 8a) that there was "no genuine issue as to any material fact or any of the inferences which are drawn from the facts" established by the Government's documentary evidence.

The Krasnov appellants contend (J. St. No. 238, p. 26) that *Frederick Hart & Co.* v. *Recordgraph Corp.*, 169 F. 2d 580 (C. A. 3), established the rule in the Third Circuit that "summary judgment cannot be entered" when "the affidavits and other evidentiary matter of the moving party controvert the allegations contained in the pleading of the opposing party" and that, since the defendants' answers contradicted "matters stated in the [Government's supporting] documents," "the defendants should have been given the opportunity to offer evidence in support of their answers" (*id.*, 27). As the District Court correctly pointed out (*id.*, 18a), however, the *Hart* case held only that "affidavits filed in support of motions for summary judgment may be considered for the purpose of ascertaining whether an issue of fact is present but that they cannot be used as a basis for deciding the fact issue," and that the *Hart* case was inapplicable since "[t]he Government has established by the intro-

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May 17, 1954 and February 2, 1955). In addition, both sides submitted memoranda of law on the question. Furthermore, following those proceedings the District Court itself ruled that a few of the documents were not admissible, and those documents "were not referred to in determining the facts" (J. St. No. 238, p. 7a). The remaining documents, which the court held were "relevant and admissible," met the requirements of Rule 56 (e) that the supporting affidavit and documents "set forth such facts as would be admissible in evidence."

duction of documentary evidence all of the facts necessary to establish its case" (*id.*, 119a).

The *Hart* case does not hold, as appellants would read it, that a mere general denial of the allegations in the complaint (such as the Krasnovs' answer here contained) raises factual issues with respect to detailed factual statements set forth in the plaintiff's affidavit and supporting documents.[13] Indeed, the rule which appellants propose would, as a practical matter, preclude the use of summary judgment in any case in which the defendant filed a general denial, even though the plaintiff's supporting documents established, as they did in the instant case, that there was no genuine factual issue.

In deciding the motion, the District Court, therefore, was not called upon to resolve any factual issues but only to draw inferences from the undisputed facts. Necessarily, inferences must be drawn in determining whether the undisputed facts show that the moving party is entitled to judgment as a matter

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[13] The holding in *Hart* was that the District Court had erred in granting a motion to dismiss the complaint, since "the existence of a fact issue" with respect to a certain conversation had been established by conflicting affidavits filed by the plaintiff and the defendant, and by a specific allegation in the defendant's answer relating to the conversation (169 F. 2d at 583).

The rule for which appellants cite the *Hart* case has been severely criticized (see 6 Moore's *Federal Practice* ¶ 56.11 [3] at p. 2069; 99 U. Pa. L. Rev. 212, 214–15), and has been rejected in a proposed revision of the Federal Rules of Civil Procedure, now before this Court. See *Report of Proposed Amendments*, October 1955, pp. 56–58.

of law.[14] This Court has upheld summary judgments in antitrust cases where the district court similarly drew appropriate inferences in favor of the Government. *E. g., Associated Press* v. *United States*, 326 U. S. 1; *International Salt Co.* v. *United States*, 332 U. S. 392; cf. *United States Gypsum Co.* v. *United States*, 339 U. S. 959; *United States* v. *United States Gypsum Co.*, 340 U. S. 76, 82–86; cf. also, *United States Gypsum Co.* v. *National Gypsum Co.*, 352 U. S. 457.

B. The District Court correctly held, on the basis of the facts shown by the Government's affidavit and documents, that appellants had conspired and combined to restrain unreasonably and to monopolize the ready made furniture slip cover industry, in "clear violation of the Sherman Antitrust Act" (J. St. No. 238, p. 32a).

1. Comfy and Sure-Fit together had 61% of the market; their nearest competitor had only 9%; and the remaining 30% was spread over twelve or more firms.[15] Following the signing of the patent licensing

[14] Appellants in No. 254 state (J. St. 11–12) that they "know of no other instance" where a court has found an attempt to monopolize upon a motion for summary judgment, and that it is "difficult to conceive of a record which would eliminate any dispute as to the fact of specific intent which normally determines such an issue." The fact is, however, that, although the complaint did charge an attempt to monopolize, the District Court did not find such an attempt, but only a conspiracy and combination to monopolize. J. St. *Id.*, 32a, 34a.

[15] These figures are derived from the Government's affidavits filed in support of the motion for summary judgment. Although Comfy challenges the use of these figures on the basis of figures for other years (J. St. No. 254, pp. 10–11), it never controverted the Government's data through opposing affidavits under Rule 56 (e). Its figures for other years were presented

agreement of October 4, 1938, these two dominant firms jointly embarked upon a program of patent infringement litigation which, the District Court correctly held, was designed to eliminate and harass competition and thereby to secure for the conspirators a larger share of the market.

As the District Court pointed out (*id.*, pp. 13a–14a), they preferred to sue retailers rather than allegedly infringing manufacturers because "[t]hey recognized and took full advantage of the almost universal aversion of a retailer to patent litigation and their suits were brought for the purpose of having the retailer discontinue a competitor's line and adopt theirs; they had no interest or intention of adjudicating the validity of the Oppenheimer patent." The effect of these suits against retailers was that many of them, as the price of terminating the litigation, discontinued handling competing merchandise. Although a determination that the Oppenheimer patent was valid would have given Comfy and Sure-Fit the basis for seeking a lawful monopoly, they carefully avoided any adjudication of the patent's validity, even going so far as to settle the Rosner suit at substantial expense to both of them as soon as Rosner vigorously raised the issue (see *supra*, pp. 9–10). Significantly, that suit, brought against a competing manufacturer *for damages*, was filed only after it had been determined that the prospective defendant was financially weak (*ibid.*).

(in connection with the relief proceedings) only *after* the District Court had granted the motion for summary judgment, and not by affidavit but in letters from the Census Bureau.

Harassment of competitors by patent litigation is a familiar technique in antitrust cases. *E. g., Patterson* v. *United States,* 222 Fed. 599 (C. A. 6), certiorari denied, 238 U. S. 635; *Kobe, Inc.* v. *Dempsey Pump Co.,* 198 F. 2d 416, 424 (C. A. 10), certiorari denied, 344 U. S. 837; *United States* v. *Besser Mfg. Co.,* 96 F. Supp. 304, 311-312 (E. D. Mich.), affirmed, 343 U. S. 444; *United States* v. *Hartford-Empire Co.,* 46 F. Supp. 541, 565 (N. D. Ohio), affirmed in part, 323 U. S. 386; *Stewart-Warner Corporation* v. *Staley,* 42 F. Supp. 140, 146 (W. D. Pa.). Here, as in *Hartford-Empire,* "the power of litigation pursued by a strong combination of two companies * * * is brought into play against individual companies, most of them [retailers or] small manufacturers * * *." The record fully justified the District Court's conclusion that Comfy and Sure-Fit jointly had engaged in a similar program of unlawful harrassment.

2. The existence of the conspiracy is further shown by various restrictive provisions in the licensing agreement—provisions which not only were important elements of the conspiracy and in its effectuation but themselves were illegal because they exceeded the proper scope of patent rights.

(a). The provision in the license agreement giving Sure-Fit the right to bring infringement suits if Comfy refused to do so was illegal. The only persons who can sue for infringement are the patentee, his assignee, grantee or personal representative. *Crown Die & Tool Co.* v. *Nye Tool & Machine Works,* 261 U. S. 24, 40–41. Comfy, as the assignee of the patent, had the right to sue for infringement. However, Comfy

was authorized to grant only non-exclusive licenses (*i. e.*, those under which the licensor himself is not precluded from manufacturing or selling, *Crown Die* case, *supra*, pp. 37–38) and Comfy in terms gave Sure-Fit only such a license.[16] The only property interest which a non-exclusive licensee (whether he is the sole such licensee, as here, or one of many) has in the patent is the right to make and sell thereunder. He has no right to exclude others from practicing the invention (through infringement suits) (*Blair v. Lippincott Glass Co.*, 52 Fed. 226 (D. Ind.); *Western Elec. Co.* v. *Pacent Reproducer Corp.*, 42 F. 2d 116, 118 (C. A. 2), certiorari denied, 282 U. S. 873; *Davision* v. *Alexander Smith & Sons Carpet Co.*, 22 F. Supp. 461, 462 (S. D. N. Y.)), since that right is limited to the patentee, an assignee, or an exclusive licensee. Insofar as the agreement authorized Sure-Fit to bring infringement suits if Comfy refused to do so, it exceeded the lawful scope of the patent monopoly. See *Waterman* v. *Mackenzie*, 138 U. S. 252; *Crown Die* case, *supra*, at pp. 39–40.

(b). Similarly beyond the scope of the patent grant was the provision prohibiting Comfy from granting other licenses without Sure-Fit's consent. Since Sure-Fit was a non-exclusive licensee under the patent (see *supra*, pp. 6, 22–23), it had no legitimate interest

[16] Appellants in No. 238, although recognizing that Sure-Fit received only a non-exclusive license, argue that Comfy's agreement not to grant any other licenses gave Sure-Fit "an exclusive license within the meaning of the patent laws" (J. St., 13–14). They cite no authority for this proposition, and we believe that the law is clearly to the contrary. See the text, *supra*.

in preventing the issuance of other non-exclusive licenses. The provision giving it a veto power over the grant of other licenses was obviously "intended * * * to be a means whereby control of the industry could be acquired and competition eliminated." *United States* v. *Besser Mfg. Co.*, 96 F. Supp. 304, 311 (E. D. Mich.), affirmed, 343 U. S. 444. In *Besser*, the court invalidated an agreement under which the "patentees have joined hands with the two largest competitors in the industry" and, "by requiring their joint consent before licensing others," has given them "the power to restrict competition" and has "virtually made it impossible for others to obtain rights under those patents. * * * It is this combination requiring collective action that primarily invalidates the agreement." The same principle, we submit, is equally applicable to an agreement under which "the two largest competitors in the industry," with the consent of the patentee, similarly have "joined hands" to make it "impossible for others to obtain rights" "by requiring their joint consent before licensing others" under a patent held by one of the competitors as an assignee authorized to grant only non-exclusive licenses.

(c). The price-fixing provisions, under which Sure-Fit agreed not to undersell Comfy, and Comfy agreed to maintain its "scheduled prices," and pursuant to which the two firms fixed prices (see *supra*, pp. 11–12), were also invalid. Appellants seek to justify these provisions under *United States* v. *General Electric Co.*, 272 U. S. 476 (J. St. No. 238, pp. 16–21), where this Court held that the requirement in a patent license that the licensee sell at not less than the prices

at which the patentee itself sells is within the implied terms of the patent grant. The ground of decision was that this limitation is "normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly," in that it enables the patentee to obtain as a reward the return coming from multiple exploitation of the exclusive rights conferred by his patent, without impairing his opportunity to obtain the reward which comes from selling the patented product himself at whatever price he thinks will bring the greatest return. 272 U. S. 476, 489–490.

In the instant case, however, the agreement went beyond requiring the licensee to observe the licensor's prices, and bound the licensor itself not to deviate from its prices. This latter provision, we submit, cannot be justified as "normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly." On the contrary, the *General Electric* case indicates that protection of the patent monopoly contemplates that the patentee will be free to set the price of his product at whatever level he deems best. Furthermore, the *General Electric* rule is applicable only if "a conspiracy to restrain trade or an effort to monopolize is not involved." *United States* v. *Line Material Co.*, 333 U. S. 287, 304. In the instant case, as we have shown, the price-fixing was part of a conspiracy by Sure-Fit and Comfy to restrain and to monopolize trade.[17]

[17] Comfy and Sure-Fit acted jointly to maintain resale prices at the retail level. See *supra*, pp. 11–12. Such an agreement clearly was illegal. *United State* v. *Univis Lens Co.*, 316 U. S. 241.

2. The relief granted by the District Court was proper

Appellants in Nos. 238 and 254 challenge various provisions of the decree. Primarily, they attack paragraph VI, which prohibits the appellants "jointly and severally" from engaging in certain restrictive trade practices. We submit, however, that the challenged provisions represented a proper exercise of the District Court's broad "discretion * * * to make the remedy as effective as possible" (*United States* v. *National Lead Co.*, 332 U. S. 319, 334), and were fully justified in order "effectively [to] pry open to competition a market that has been closed by defendants' illegal restraints" (*International Salt Co.* v. *United States*, 332 U. S. 392, 401–402). Furthermore, since appellants "were found to have plainly disregarded the law," the District Court "was justified in its determination that it was necessary to include some restraint in its order against" the appellants "individual[ly] in order to prevent a continuance of the unfair competitive practices found to exist." *Federal Trade Commission* v. *National Lead Co.*, 352 U. S. 419, 429–430.

Appellants in No. 238 argue (J. St. 24–25) that the District Court did not "find" that the allegations in the complaint with respect to the restrictive trade practices enjoined in paragraph VI had been "sustained,"[18] and that, in any event, there was no "foundation in the record for concluding that such relief is necessary and appropriate" to "dissipate a

[18] Appellants in No. 254 similarly assert (J. St. 6) that these allegations "had not been found in the opinion to be sustained by the evidence."

conspiracy." But the absence of findings with respect to the practices is immaterial, since Rule 52 (a) expressly provides (with an exception not here material) that "[f]indings of fact and conclusions of law are unnecessary on decisions of motions under Rule * * * 56 * * *." As long as the record affords an adequate basis for the conclusion that prohibition of the practices is necessary in order "effectively [to] pry open to competition" the market, the relief was proper.

In the instant case, the record shows that the principal anticompetitive device used by the conspirators was harassing patent litigation. But Comfy and Sure-Fit employed other restrictive practices which were designed to, and did, aid them in carrying out their conspiracy to restrain and monopolize the knitted slip cover industry. Thus, the exclusive dealing arrangements with important customers, which Comfy and Sure-Fit obtained by giving discriminatory preferences (see *supra*, p. 13), effectively barred other manufacturers from that segment of the market. Competitors were likewise excluded as a result of the conspirators' insistence that retail customers, as the price of terminating infringement suits, cease handling competitors' products (see *supra*, pp. 7–9, 13–14). In addition, the conspirators contracted with suppliers that the latter would not sell to other manufacturers, made disparaging statements about competitors' products, and removed such products from the market by purchasing and reselling them through retail outlets (see *supra*, p. 14).

Paragraph VI, which broadly prohibits all of the foregoing restrictive practices, represented a sound exercise of the District Court's discretion to provide relief adequate to "cure the ill effects of the illegal conduct, and assure the public freedom from its continuance" (*United States* v. *United States Gypsum Co.*, 340 U. S. 76, 88). Moreover, relief is not limited to prohibiting the precise practices shown by the record, "but may range broadly through practices connected with acts actually found to be illegal * * * relief, to be effective, must go beyond the narrow limits of the proven violation" (*Gypsum* case, *supra*, pp. 89, 90). In view of the clear evidence that appellants had conspired to restrain and to monopolize trade, we believe that, even assuming *arguendo* that there was only relatively slight evidence of some of the restrictive practices, the District Court did not abuse its discretion in "forbid[ding] the doing in the future of acts like those * * * found to have been done in the past which would be violative of the statute" *Standard Oil Co.* v. *United States*, 221 U. S. 1, 78).[19]

Appellant Comfy challenges the provision in paragraph VI (c) prohibiting appellants from granting special discounts, advertising allowances, or return privileges to favored customers, on the ground that

[19] The third question presented in No. 254—whether a District Court may enjoin antitrust defendants individually from engaging in restrictive trade practices "in the absence of any evidence that such practices were related to the conspiracy found by its opinion or that such relief was required by competitive conditions in the industry" (J. St. 3, 16)—is therefore not in fact presented. For here the record shows both that the prohibited practices were an integral part of the conspiracy, and that their prohibition was necessary for effective relief.

the court was attempting to enjoin violations of the Robinson-Patman Act which were not charged in the complaint (J. St. No. 254, pp. 13–16). The short answer is that the court was prohibiting restrictive practices which were a part of the conspiracy and which, if continued, would permit the conspirators to retain the fruits of their unlawful conduct. The complaint alleged (¶ XI (i) (2)) that, as one of the "substantial terms" of the conspiracy, the defendants had granted "special discounts, excessive advertising allowances and abnormal return privileges to retailers who agree to carry their merchandise exclusively," and the record showed that appellants had engaged in such practices (see the Statement, *supra*, pp. 13–14). As appellants themselves concede (J. St. No. 254, pp. 15–16), the fact that, under certain circumstances, such practices also might violate the Robinson-Patman Act does not preclude the District Court from enjoining them in order to cure a Sherman Act conspiracy.

Comfy also assails the provision in paragraph VI (d) which prohibits the appellants from making exclusive dealing arrangements with retailers (J. St. No. 254, pp. 17–18). Such arrangements, however, were an important step in appellants' campaign to dominate the industry; indeed, an agreement by a retailer to deal exclusively with one of the conspirators generally was the price for terminating a patent infringement suit (see the Statement, *supra*, pp. 7–9). Nor is there any basis for Comfy's attack (*id.*, 17) on the prohibition in paragraph VI (B) against making "false, derogatory or disparaging statements" about competing slip covers, or "false statements" as to the

financial ability of competing manufacturers. The making of such statements about competitors' products was alleged in the complaint as one of the methods of the conspiracy (¶ XI (i) (3)), and is shown by the record (GX 463). The District Court did not abuse its discretion in prohibiting the practice.

The Krasnov appellants attack, as "vague and all-inclusive" and "unwarranted by the record", paragraph V (b), which enjoins the defendants from "combining and conspiring" or from contracting or agreeing to "monopolize or attempt to monopolize the manufacture, distribution or sale" of ready-made furniture slip covers (J. St. No. 238, p. 24). This provision was plainly proper, since it prevents any repetition of the conspiracy here involved. Cf. *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 186–187. It is sufficiently specific so that appellants "may know their duties and unintended contempts may not occur." *International Salt Co.* v. *United States*, 332 U. S. 392, 400.

3. The action did not abate as to Joseph Krasnov

On July 30, 1956, the District Court rendered its opinion holding that the defendants had violated the antitrust laws. The decree was entered on March 14, 1957. On April 9, 1957, Samuel and Seymour Krasnov advised the court that defendant Joseph Krasnov had died on February 16, 1957 (approximately one month prior to entry of the judgment), and on April 23, 1957, they moved to delete his name from the judgment, on the ground that the action had not survived against him. The District Court denied the motion

(J. St. No. 238, pp. 42a-43a), and substituted his executors as parties to the judgment.

We submit that the District Court correctly held, contrary to the Krasnov appellants' contention (*id.*, 29), that the action did not abate as to Joseph Krasnov on his death. Under Rule 25 (a) of the Federal Rules of Civil Procedure, a court may order substitution of parties when a party dies "and the claim is not thereby extinguished." Unlike many actions at law, suits in equity generally do not abate upon the death of a party. *Clarke* v. *Mathewson*, 12 Pet. 164, 171; *Edgerton* v. *Johnson*, 178 F. 2d 106, 110 (C. A. 7); *Sullivan* v. *Associated Billposters and Distributors*, 6 F. 2d 1000, 1003 (C. A. 2). Under the Sherman Act, even actions at law may survive the death of a party. *Barnes Coal Corp.* v. *Retail Coal Merchants Ass'n*, 128 F. 2d 645 (C. A. 4); *Moore* v. *Backus*, 78 F. 2d 571 (C. A. 7); *Sullivan* v. *Associated Billposters and Distributors*, *supra*; *United Copper Securities Co.* v. *Amalgamated Copper Co.*, 232 Fed. 574 (C. A. 2). This equity action was brought by the Government to vindicate the public interest by eliminating trade restraints affecting a substantial volume of interstate commerce, and the Government's "claim" was not extinguished until effective relief against such restraints was provided. An injunction against only two members of the Krasnov partnership, which would leave the heirs of the deceased partner free to continue the illegal activities, would not be adequate to "assure the public freedom from its [their] continuance." *United States* v. *United States Gypsum Co.*, 340 U. S. 76, 88.

In any event, as the court pointed out (J. St. No. 238, pp. 42a–43a), the decree could have been entered *nunc pro tunc* as of a date when Joseph Krasnov was still alive. See 1 Freeman on *Judgments* § 122 (5th ed., 1925). A judgment *nunc pro tunc* "presupposes * * * a decree in a cause which is under advisement when the death of a party occurs." *Cuebas y Arredondo* v. *Cuebas y Arredondo*, 223 U. S. 376, 390. *A fortiori*, a judgment *nunc pro tunc* may be entered where the case is no longer under advisement but has been decided.

4. The District Court correctly held that appellant Oppenheimer was a party to the conspiracy

Appellant Oppenheimer contends only that the District Court erred in holding him to be a party to the conspiracy. He argues (J. St. No. 255, pp. 4–5) that his activities were solely those "of an inventor interested in collecting royalties on his patent," and that there was "no proof" that he had knowledge "of the alleged acts of Comfy and Sure-Fit," which proof "is required before he can be held to be a co-conspirator."

Oppenheimer admits (*id.*, 4), however, that he approved the licensing agreement between Comfy and Sure-Fit; and that he agreed to, and did, contribute to the expenses of the harassing infringement suits (GX 329–330, 478–479, 482, 486). Since the suits against retailers usually resulted in the latter ceasing to handle competing merchandise (see *supra*, pp. 7–9), their effect necessarily was to increase sales of Comfy and Sure-Fit products, and therefore to

increase Oppenheimer's royalties. Furthermore, the evidence showed that Oppenheimer was kept informed as to the progress of the negotiations with Rosner for terminating the suit in which the latter had attacked the validity of Oppenheimer's patent (GX 316, 317, 320, 325, 328), that he contributed to the expenses incurred in discontinuing the suit, and that he shared equally in the royalties paid by Rosner under the license which Rosner received from Comfy (GX 492). In addition, the court noted (J. St. No. 238, p. 30a), Oppenheimer "readily acquiesced in reduction of patent royalties whenever necessary to end litigation which would determine the validity of the patent." As the District Court correctly held (J. St. No. 238, p. 30a), he "formed a necessary part of the whole," and his participation in this conspiracy was fully established. See *United States* v. *Falcone*, 311 U. S. 205, 211. The fact that Oppenheimer was "not engaged in the slip cover business" (J. St. No. 255, p. 4) is not inconsistent with the court's ruling that he had been a party to a conspiracy to restrain and monopolize that business.

CONCLUSION

For the foregoing reasons, we submit that the decision below is correct and that these appeals present no substantial question. The judgment of the District Court should be affirmed.

Respectfully submitted.

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AUGUST 1957.

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IN THE

Supreme Court of the United States

October Term, 1957.

No. 238.

SAMUEL KRASNOV, ET AL.,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From the United States District Court for the Eastern District of Pennsylvania.

PETITION FOR REHEARING.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1957.

No. 238.

JOSEPH KRASNOV, ET AL.,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

PETITION FOR REHEARING.

Pursuant to Rule 58 of the Rules of this Court, appellants Krasnov petition for rehearing of the order entered October 14, 1957, granting appellee's motion to affirm.

The ground of this Petition is that appellants were effectively precluded by the single District Court judge from establishing their factual defenses to the complaint and the right to plenary review of that judge's rulings was foreclosed by the operation of the Expediting Act.

This civil action by the United States under the anti-trust laws was presented to a single District Court judge on appellee's (plaintiff's) motion for summary judgment. As described in the Jurisdictional Statement, appellants were effectively precluded from presenting affidavits in opposition to the motion except in the form of an offer of

proof. Then, instead of permitting appellants to introduce evidence in support of their offer, the judge decided the motion in favor of appellee by making findings which conflict with the offer of proof and by drawing from the material supporting the motion only those inferences which favor the moving party. Thus, appellants were not afforded even that hearing contemplated by the summary judgment procedure.

In the usual case, appellants would have pursued their right to review by the Court of Appeals. However, since this case falls within the Expediting Act, review could be obtained only by filing a Jurisdictional Statement in this Court. In the present appeal, the purpose of the Jurisdictional Statement was merely to show that this Court had jurisdiction and that the questions were substantial.[1] Plainly, the submission of a Jurisdictional Statement is in no sense equivalent to the filing of a brief and oral argument on the merits either in the Court of Appeals or in this Court.[2]

Summary judgment was intended to eliminate trials where there are no genuine factual issues, and the Expediting Act was designed to ensure prompt and final review of matters of great public importance. Their application in this case, however, deprived appellants of the sort of hearing demanded by the most essential notions of fairness. Here, on motion for summary judgment, appellants had only an incomplete hearing before a single judge in the District Court and none at all in the Court of Appeals. Their final and only opportunity to expose the errors below and obtain a full hearing was denied by the Rules of this Court which did not permit the initial filing of a brief on the merits and

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1. Rule 15 of the Rules of the Supreme Court of the United States.

2. Appellants also filed a brief in reply to appellee's motion to affirm. The purpose of this brief was the same as that of the Jurisdictional Statement.

by the decision of this Court summarily affirming. A realistic appraisal of these circumstances demonstrates conclusively that appellants have not had "a day in court."

For these reasons appellants request that this Court vacate its order entered October 14, 1957, and either: (1) note probable jurisdiction and set the case down for oral argument; or (2) remand the case to the District Court with instructions that appellants be allowed to file affidavits under Rule 56(e) in support of their offer of proof and thereafter to argue anew appellee's motion for summary judgment.

In the alternative appellants request that paragraph VI(C) be deleted from the Final Judgment. That paragraph enjoins appellants from granting to a retail customer special discounts, advertising allowances or return privileges which are not available to others on proportionately equal terms. This relief is not justified by the complaint even if taken to be true; the allegations relating to the subject are covered by other terms of the judgment; and there is no finding on this point in the opinion of the Court below. The impropriety of this portion of the judgment will be amplified in the Petition for Rehearing to be filed by The Comfy Manufacturing Company and Fred Katzner.

Respectfully submitted,

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Certificate.

I hereby certify that this Petition for Rehearing is presented in good faith and not for delay.

C. BREWSTER RHOADS,
Attorney for Appellants.

Office Supreme Court, U.S.
FILED
JUL 9 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

NO. ~~1154~~ 254

THE COMFY MANUFACTURING COMPANY
and FRED E. KATZNER, *Appellants*

v.

UNITED STATES OF AMERICA, *Appellee*

On Appeal from the United States District Court for the Eastern District of Pennsylvania

STATEMENT AS TO JURISDICTION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No.

THE COMFY MANUFACTURING COMPANY
and FRED E. KATZNER, *Appellants*

v.

UNITED STATES OF AMERICA, *Appellee*

On Appeal from the United States District Court for the Eastern District of Pennsylvania

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STATEMENT AS TO JURISDICTION

Appellants appeal from the final judgment issued by the United States District Court for the Eastern District of Pennsylvania, on March 14, 1957 in a proceeding brought by the United States under Section 4 of the Sherman Act, and submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the District Court for the Eastern District of Pennsylvania is reported at 143 F. Supp. 184 and is attached to this statement as Appendix A. The Court's final judgment is unreported, and it is set forth in full as Appendix B.

JURISDICTION

This suit was brought by the Government under 15 U.S.C. § 4 to enjoin an alleged conspiracy in unreasonable restraint of trade in the slip cover industry in violation of Section 1 of the Sherman Act (15 U.S.C. § 1), and an alleged conspiracy to monopolize the slip cover industry in violation of Section 2 of that Act (15 U.S.C. § 2). Judgment for the plaintiff was entered on March 14, 1957 and Notice of Appeal was filed on behalf of defendants Comfy Manufacturing Co. and Fred E. Katzner in the U. S. District Court for the Eastern District of Pennsylvania on April 4, 1957. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 15 U.S.C. § 29. The following decisions sustain the jurisdiction of this Court to review such a judgment on direct appeal: *United States* v. *California Cooperative Canneries*, 279 U.S. 553; *United States* v. *Times-Picayune Publishing Co.*, 345 U.S. 594.

STATUTE INVOLVED

Sections 1, 2 and 4 of the Sherman Act, 15 U.S.C. §§ 1, 2, 4, set out in full as Appendix C.

QUESTIONS PRESENTED[1]

1. May a District Court on motion for summary judgment find a conspiracy to monopolize an industry on the basis of factual inferences from letters subject to conflicting interpretations and fragmentary industry statistics.

2. Does a District Court have jurisdiction to enjoin violations of the Robinson-Patman Act in the absence of any charge or proof of violation of that statute?

3. Is a District Court authorized to enjoin antitrust defendants from individually engaging in competitive trade practices in the absence of any evidence that such practices were related to the conspiracy found by its opinion or that such relief was required by competitive conditions in the industry?

STATEMENT OF THE CASE

The Complaint was filed on June 7, 1950, and charged that the Comfy Manufacturing Company had combined with a competitor, the Sure-Fit Products Company, and an inventor named Oppenheimer, to monopolize the ready-made furniture slip cover industry. In 1938, Oppenheimer, who had invented a knitted slip cover, assigned his patent to Comfy. Comfy then licensed Sure-Fit under that patent and took a limited cross-license allowing it to sell chair covers under a Sure-Fit patent in 10 stores. The licensor and licensee agreed to cooperate in enforcing the Oppenheimer patent against infringers and in licensing other manufacturers, if any. Sure-Fit also

[1] The notice of appeal presents ten separate questions, none of which is hereby abandoned. For brevity, only the principal questions have been noted above.

agreed not to sell the patented product at a price lower than that charged by Comfy. In January, 1942 the price provisions were cancelled and in July, 1949, the entire agreement was cancelled.

On April 17, 1950, Comfy was subpoenaed to produce its records before a grand jury and an indictment was returned against it on June 2, 1950. Five days later this complaint was filed. The charge of the indictment is the same as the charge of the civil complaint, and it is still awaiting trial.[2]

In January, 1954, the Government filed a motion for summary judgment, upon the ground that determination of the issues of fact joined by the pleadings as to the course of dealing between Comfy, Sure-Fit and their competitors during the period 1938 to 1949 had been made unnecessary by the defendants' admissions as to documentary evidence offered in support of the motion. The principal facts established by these admissions were the execution of the 1938 agreement, the authenticity of some 500-odd pieces of correspondence obtained from the defendants' files in the grand jury investigation, the total annual volume of slip cover business respectively handled by Comfy and Sure-Fit, and the annual patent royalties paid by and to them. The Government also offered affidavits of thirteen other manufacturers of slip covers showing their net sales in the year 1948. No other testimony from any slip cover manufacturer was offered.

The defendants' correspondence was offered and received in evidence, en masse, upon a preliminary

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[2] The inventor, Oppenheimer, was charged as a co-conspirator but was not made a defendant in the criminal case.

screening for "apparent relevancy" to the complaint, at a pre-trial conference held after the Government's motion for summary judgment was filed. This screening, however, was without prejudice to the defendants' right to make and press at the trial whatever objections they might have as to the competency of a particular statement in a letter to prove a particular fact or as to the materiality of such statements to a specific issue (R. 398-400, 446-448). The motion for summary judgment was heard on December 20-22, 1955. This hearing was the only trial had, and the case was decided upon summary judgment over the defendants' objection.

On July 30, 1956, the Court rendered its final opinion which found that the documents in evidence raised no material issues of fact; that the 1938 agreement had resulted in a continuing price-fixing conspiracy which violated Section 1 of the Sherman Act; that the defendants had abused the Oppenheimer patent by their joint enforcement activity; and that they had also conspired to monopolize the ready-made furniture slip cover industry in violation of Section 2 of the Act. Although the Court noted the charge in the complaint that the defendants had also conspired with each other to employ derogatory statements, price discounts, advertising allowances, return privileges and other competitive practices to injure other slip cover manufacturers the opinion refers to no evidence in support of these allegations.

On March 14, 1957, the Court entered a judgment in accordance with its opinion which granted extensive affirmative relief intended to cure the patent abuses described in the opinion. The Court also enjoined the conspiracy to fix prices and to monopolize, described

in the opinion. In addition to this relief, the Court included five provisions tendered by the Government which enjoined the defendants from individually engaging in the various competitive practices alleged in the complaint to have been employed against competitors pursuant to the alleged conspiracy, although these charges had not been found in the opinion to be sustained by the evidence. On April 4, 1957 defendants Comfy and Fred Katzner, its president, filed this appeal.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL.

1. May a District Court on motion for summary judgment find a conspiracy to monopolize an industry on the basis of factual inferences from letters subject to conflicting interpretations and fragmentary industry statistics?

The District Court's decision of the case on summary judgment was an abuse which this Court should correct. This Court exercises sole supervisory power over the procedure employed by District Courts to decide civil antitrust suits brought by the United States. While summary judgment under Rule 56 is an accepted method of deciding such cases, the District Courts should be confined to the use of that method in the rare cases where hearing testimony could not produce a different result. This was clearly not such a case.

It may be assumed, *arguendo*, that the 1938 license agreement was intended to control the minimum price at which Comfy and Sure-Fit would sell the patented product, knitted slip covers; that they were the two largest makers of ready-made furniture slip covers; that they sought to share whatever competitive advantage could be derived from enforcement of the Oppenheimer patent against others and that

they did not wish to risk an adjudication of the patent's validity if they could enforce it without such an adjudication. Whether such an agreement is illegal per se is a dubious question, but is at least one which might properly be regarded as a question of law. If the relief granted below had been confined to dissipating whatever competitive advantage the defendants had enjoyed from their joint control of the Oppenheimer patent it could be argued that the injunction was appropriate to the summary procedure employed. In its opinion, however, the Court below undertook to find as a fact that the 1938 agreement had also resulted in a continuing conspiracy to fix prices and to monopolize an industry. Its injunction accordingly went far beyond invalidating the 1938 agreement and dissipating its effects.

Moreover the trade practice provisions included in the injunction prevented Comfy from using normal competitive practices against Sure-Fit and other slip cover manufacturers, notwithstanding the absence of any basis for such action in the Court's own opinion or in the evidence. The opinion went far beyond the undisputed facts and the injunction went far beyond the opinion. The manner in which this summary procedure enabled the Government to ride roughshod over the rights normally accorded to an antitrust defendant is shown by the Court's treatment of the monopolization charge.

The apparent basis for the Court's conclusion that there was a joint attempt to monopolize the ready-made furniture slip cover industry was that "The defendants controlled the key patents in the industry" (App. 24a); that their infringement suits against retailers were "calculated to and did extend their

dominion in the slip cover field" (App. 17a); that they had the power "to control prices in this particular field" (App. 23a); and that they were "the two largest competitors in the industry[3] and dominated it dollarwise" (App. 24a).

In moving for summary judgment upon the basis of the documents found in the defendants' files, the Government led the Court into the error of assuming that it could supply by inferences from those documents facts which would normally require independent proof. Thus, we find the Court basing its finding that defendants had the power to control prices on an inference from a claim in a letter (Gov. Ex. 502)[4] from Katzner, County's president, to Sure-Fit's counsel stating that Sears, Roebuck respects patents (App. 23a). In admitting the authenticity of this letter the defendants clearly did not admit the fact that Sears, Roebuck respected patents to the point of accepting

[3] The terms, "the industry" and "the slip cover field" actually refer to only to the ready-made furniture slip cover industry. There was no evidence concerning custom-made furniture slip covers and the Court's conclusion that the ready-made manufacturers constituted a separate industry, subject to monopolization in violation of Section 2, was made without benefit of any evidence as to the functional interchangeability of these products. That this was a matter of decisive significance, which would ordinarily be resolved only after hearing expert testimony, is shown by this Court's decision in *United States* v. *Dupont*, 351 U.S. 377. Yet the Court was induced to draw an inference that such interchangeability did not exist from statiscal evidence confined entirely to ready-made slip covers.

[4] The letter was written in a futile effort to persuade Sure-Fit to continue to pay royalties on the Oppenheimer patent. Sure-Fit had cancelled the license agreement because a "large number of others are manufacturing knitted slip covers like Sure-fit's knitted slip covers, without paying any royalty under the Oppenheimer patent. (Gov. Ex. 501).

the manufacturer's judgment of their scope and validity in preference to that of Sears' own counsel. If that were thought to be a material fact, some testimony from some representative of Sears, Roebuck would be required to establish it. But even if Katzner's claim were regarded as proof of the claimed fact it could not support the Court's ultimate conclusion that the Oppenheimer patent gave the defendants power to fix ready-made furniture slip cover prices. Ownership of a patent automatically gives power to exclude any price or other competition from infringing products. However, the fact that the Oppenheimer patent excluded such competition did not mean that whoever controlled this particular knitted slip cover patent could control slip cover prices or monopolize the slip cover industry. That conclusion is not supported by Katzner's letter or any other evidence.

In describing the defendants' patents as "key" patents the Court evidently meant that knitted slip covers, the only kind which the Oppenheimer patent affected, were a key to domination of the ready-made slip cover industry.[5] Yet there is no evidence as to the proportion that sales of knitted slip covers bore to total sales of ready-made slip covers at any time. Although the Government offered evidence of the annual sales volume of the defendants it offered no evidence of the amount of their knitted slip cover sales. The Court noted that there were generally

[5] As to the other patents referred to by the Government, Comfy patents Nos. 2,238,795 and No. 2,212,485 and Krasnov Patent No. 1,984,973, there is no evidence that any were ever enforced or asserted against anyone; no evidence that any sales were made under them or any royalties paid. The patents themselves were not offered in evidence and there is no description anywhere in the record of their subject matter.

speaking four different types of slip covers of which knitted was only one (App. 2a), but there was no evidence from manufacturers, retailers, customers, marketing experts or any other persons who might presumably give an informed opinion, as to the advantages, if any, of the patented knitted slip covers over other slip covers made of woven fabric, elastic fabric, or plastic material.

In support of the allegation that defendants "dominated the industry dollarwise", the Government offered evidence as to the total sales of other manufacturers of ready-made furniture slip covers only for the year 1948 (R. 107, 230-242). Although complete official census figures for all such manufacturers were available for the years 1947 and 1954, the Government chose to present only incomplete figures for the year 1948, when no census was made. The Government's figures were based upon affidavits obtained from a selected group of manufacturers in response to inquiries made by the Justice Department for the purpose of this case. That group included only fifteen manufacturers with annual sales of more than $100,000 although there were twenty-one such manufacturers according to the 1947 census (R. 922). The defendants' combined sales for 1947 were actually only 54% of the total of ready-made furniture slip cover manufacturers as shown by the census (R. 165-169, 922, 926, 933). By using as the total for the year 1948, only the sales of the defendants and the thirteen manufacturers from which the Government offered affidavits, the Government constructed an inflated figure of 62% for the year 1948. This figure was then urged upon the Court as evidence of defendants'

alleged monopolization. The Government's procedure prevented cross-examination which would have shown that the 62% figure was erroneous when it was first pressed upon the Court.

Significantly, the Government offered no evidence as to the defendants' position in the ready-made furniture slip cover field after 1948 although it had complete census figures for such manufacturers in 1954. A comparison of the defendants' sales for that year with the census figures shows that their combined position in 1954 was much less favorable than it had been in 1948. By 1954 their combined percentage of ready-made furniture slip cover sales had declined to 46 per cent. From 1947 to 1954, the number of such slip cover manufacturers with an annual volume over $100,000 nearly doubled.[6] Normally, upon a complaint brought in 1950, even after a full trial, the Government would have felt some obligation to show current competitive conditions in the slip cover industry before requesting in 1957 a broad injunction intended to end an alleged conspiracy to monopolize it. The granting of such an injunction, without such evidence or even an evaluation of conflicting claims as to the period preceding the complaint in the normal context of live testimony, was an abuse of summary judgment procedure.

We know of no other instance where a court has found an attempt to monopolize an industry upon a

[6] According to the Bureau of the Census, the number of slip cover manufacturers reporting shipments in excess of $100,000 increased from twenty-one in 1947 to thirty-seven in 1954. (R. 922 and 926).

motion for summary judgment[7] and it is difficult to conceive of a record which would eliminate any dispute as to the fact of specific intent which normally determines such an issue. A specific intent to monopolize may not be inferred from a conspiracy in restraint of trade. An additional intention that the conspiracy result in monopoly must be explicitly shown. *United States* v. *Times-Picayune Publishing Co.*, 345 U.S. 594, 626. No evidence was before the Court in this case from which such an intent could be found. In all of the documents before the Court there is not a line showing that Comfy or Sure-Fit, singly or together, intended anything more than what their license agreement provided by its express terms. The decision in this case is a precedent for unwarranted charges of attempted monopolization which this Court should reverse.

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[7] The closest approaches are the Associated Press and United States Gypsum cases. In the former case the A.P. by-laws were held to be a contract in violation of the Sherman Act but there is no discussion of any violation based upon a monopolistic intent other than that demonstrated by the by-laws themselves, to monopolize the A.P.'s own news. *U. S.* v. *Associated Press*, 52 F. Supp. 362, 326 U.S. 1. In the latter case the conspiracy in violation of Section 1 was found to have resulted in actual monopolization in violation of Section 2 because the conspiracy included all of the manufacturers in the industry. *U. S.* v. *U. S. Gypsum Co.*, 340 U.S. 76. Unlike this case, the summary judgment entered there was not based upon any evaluation of documents reflecting a course of business, unaided by the testimony of the authors. The summary judgment there was justified by this Court's opinion reviewing a record which contained a full examination and cross-examination of such witnesses. 333 U.S. 364, 372; 340 U.S. 76, 82, 86.

2. Does a District Court have jurisdiction to enjoin violations of the Robinson-Patman Act in the absence of any charge or proof of violation of that statute?

The Court lacked jurisdiction to enjoin the defendants from competing with each other and with other slip cover manufacturers by using price concessions. Section VI (C) of the decree provided for an injunction against the individual use of price concessions which might violate the Robinson-Patman Act, 15 U.S.C. § 13(d), in the following terms:

> (C) Granting to any retailer of slip covers special discounts, advertising allowances or return privileges which are not available to others on proportionately equal terms; (App. 35a)

No charge of a violation of the Robinson-Patman Act by any defendant was made in the Complaint, the Government's briefs or in its oral argument; nor was there any proof of such a violation.

The Court's opinion refers to no evidence supporting the Government's charge that the defendants agreed with each other to give price discounts, advertising allowances, return privileges or other special concessions to their retail customers. Any use of extraordinary price concessions was inconsistent with the Government's claim that the defendants had agreed to fix minimum prices for slip covers and the evidence showed that their insistence upon using such concessions to take business from each other resulted in the cancellation of the price provisions of their license agreement in 1942.[8]

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[8] See Gov. Ex. 18A containing the full text of the letter from Comfy to its attorney, quoted in part in the opinion (App. 12a, 13a). Gov. Exs. 385, 420, 443, 455 and 459 show such competition before and after the cancellation.

At the hearing on defendants' objections to the Government's proposed decree, the Government asserted that its proposed injunction against discriminatory discounts should be included because the proposed injunction was in terms similar to the prohibitions of the Robinson-Patman Act. There was no proof that this conduct, if not enjoined, would tend to further the conspiracy described in the opinion, or any similar conspiracy.

The Government's reasoning was apparently as follows: The defendants regularly gave price concessions in competing with each other and with other manufacturers. While there was no evidence that any concession granted was itself illegal under the Robinson-Patman Act or had been granted pursuant to an agreement between the defendants, the defendants were, after all, violators of the Sherman Act. Therefore, the decree should also make them liable in contempt for independent Robinson-Patman Act violations.

In reaching this conclusion the Court and the Government completely overlooked the limitations upon the Court's jurisdiction resulting from the nature of the complaint. This complaint was filed under Section 4 of the Sherman Act (15 U.S.C. § 4) and charged only violations of Section 1 and 2 of that Act (15 U.S.C. §§ 1 and 2). Section 4 does not authorize any injunction against violation of the Robinson-Patman Act. Where the Government seeks to enjoin a violation of that Act it must charge such a violation in a complaint filed under Section 15 of the Clayton Act (15 U.S.C. § 25). Congress established independent enforcement authority for violations of the Robinson-Patman and Sherman Acts because they contain contradictory prohibitions.

The Robinson-Patman Act is aimed at price variations by a single manufacturer which discriminate between large and small buyers. The Sherman Act is aimed at agreements between two or more manufacturers which inhibit such price variations. Congress has carefully distributed enforcement jurisdiction of these statutes so that no businessmen may be enjoined from violating the Robinson-Patman Act in a suit charging only violations of the Sherman Act.

No court is authorized to enjoin violations of the Robinson-Patman Act in a proceeding where a violation has not been charged and proved. Before there is any liability for contempt, a respondent must be shown to have violated either a Federal Trade Commission order specifically applying the Act to the respondent, or a specific District Court injunction based upon violations of the Act charged and proved in that Court. Only in a proceeding charging a violation of the Act may a manufacturer learn with any degree of certainty which advertising allowances or other concessions he has made to get business are thought to violate the statute.

In conditioning injunctions upon prior proof of violations Congress could not have supposed that any court would take it upon itself without such proof to prohibit by decree what the Act itself prohibits. In urging such relief upon the Court below, in a proceeding where a charge of Robinson-Patman Act violation was never even made, the Government was indifferent to its own enforcement responsibility.

We do not suggest that a Court in a Sherman Act case may not enjoin conduct which furthers a Sherman Act conspiracy regardless of whether or not the

conduct enjoined may also violate the Robinson-Patman Act. But where, as here, the conduct enjoined was in no way related to the enjoined conspiracy, there is no warrant in the Sherman Act for the injunction. The Court below was without any jurisdiction to enjoin the defendants from granting price concessions and this Court should in any event vacate this provision.

3. Is a District Court authorized to enjoin antitrust defendants from individually engaging in competitive trade practices in the absence of any evidence that such practices were related to the conspiracy found by its opinion or that such relief was required by competitive conditions in the industry?

There was no basis for any of the other injunctions against competitive trade practices in the statutes, evidence or opinion. None of the five trade practices jointly and severally enjoined by Sections VI(A) through (E) of the Decree (App. 35a, 36a) were ever shown to have been a part of the alleged conspiracy. There was not even a charge that any of them had been individually employed to restrain competition. The opinion does not suggest that there was any such proof.

With minor exceptions, the injunctions of Section VI are broad enough to prohibit normal methods of competition. These severe restrictions on normal competition appear to have resulted from the Government's assertion that an antitrust decree need not be confined to curing proven restraints but may regulate the defendants' future competition without regard to their past conduct or the purpose of the applicable statutes.

Section VI (B), for example (App. 35a), prohibits each defendant, individually, from "making or causing to be made false, derogatory, or disparaging

statements concerning slip covers manufactured by others . . ." There was no evidence or suggestion in the opinion that the defendants had ever made false statements about competing slip covers. As for derogatory or disparaging statements, Comfy has always asserted that it is one of the most successful manufacturers of slip covers because it makes the best ready-made slip covers available. Yet if this injunction is enforced, its salesmen can no longer say, what they have every reason to believe, that a competitor's slip covers are not as good as Comfy's. No matter how shoddy the competitor's product may be, Comfy's salesmen cannot mention that fact without subjecting Comfy to contempt liability under this decree. We respectfully submit that this kind of injunction contributes nothing to antitrust enforcement and its effect on Comfy's ability to survive in a competitive business like this could be disastrous. It has an obvious tendency to discredit the judicial enforcement of antitrust policy that this Court should correct.

Another example of the unwarranted nature of these trade practice provisions is Section VI (D) which enjoins all exclusive dealing contracts or understandings (App. 35a). Although Congress in §3 of the Clayton Act, 15 U.S.C. § 14, was careful to proscribe exclusive dealing arrangements only when their effect may be to substantially lessen competition, the Court's order subjected the defendants to sweeping contempt liability for all such agreements without regard to their purpose, duration or effect on competition.

Not only does the judgment foreclose the defendants from any opportunity to justify their exclusive dealing arrangements in the future, but under the summary judgment disposition of this case, the Court

precluded any evaluation of the competitive effect of the defendants' past conduct. The correspondence in the record suggests that each defendant individually sought, wherever possible, to induce retailers to carry its line and not its competitors'. Nothing in the evidence, however, points to any joint activity of this nature. Just the opposite is shown. There are several letters which show that when Comfy was trying to get a store to carry its line, it was attempting to exclude Sure-Fit (Gov. Exs. 443, 455 and 459). Likewise, the record suggests that when Sure-Fit was soliciting exclusive patronage, it was doing so at Comfy's expense (Gov. Ex. 420).

By the summary judgment technique, however, the defendants were precluded from showing the competitive context of their efforts to win a store's exclusive patronage. They were precluded from showing that as a practical matter most retailers themselves prefer to handle only one slip cover line at one time because of problems of inventory control and the confusion of patterns, sizes, styles and nomenclature to which a multiplicity of lines leads. On the face of the Government's own exhibits it appears that there were no contracts obligating a retailer to continue to deal with either defendant if he could get a better deal from a competing manufacturer on the next order.

The only qualification which the Court imposed on its order making exclusive dealing arrangements *per se* unlawful and subject to the contempt penalty was an exemption of agreements made with a retailer in a city having a population of less than 25,000 inhabitants. This qualification was not proposed either by the Government or by the defendants but was inserted by the Court *sua sponte*. If the Court's purpose in excluding

agreements with owners of individual stores in small towns was to formulate a yardstick of effect on competition, it is a wholly arbitrary and unrealistic test without any basis in the economics of this industry. There is nothing in the record below which supports the proposition that exclusive dealing arrangements *per se* substantially lessen competition where the retailer is located in a city with a population of over 25,000 but that they may not so lessen competition where the store is located in a smaller town. Just the contrary effect would normally be expected. In a small town with only one retailer, an exclusive agreement with that retailer might exclude other manufacturers from the town. In cities over 25,000, however, there are generally several retailers each of which will normally carry a different line of slip covers. If any exclusive dealing limitation were to be imposed which was related to competitive facts in this industry it would exempt towns over 25,000. The Court's exemption of towns under 25,000 is a classic example of the kind of error which occurs when injunctions are formed upon abstract notions of what is desirable, without any consideration of industry facts.

Instead of relieving the Government of the necessity of producing a broad range of proof to support its extremely broad proferred decree, the summary judgment procedure in fact confined the area of permissible relief to the narrow range of facts not in dispute. Yet the Court below felt no more constrained in granting relief by the limitations imposed by its own summary procedure than it did by jurisdictional limitations imposed by statute. This Court has always exercised its appellate jurisdiction to see that antitrust relief granted to the Government in civil cases is necessary

and properly related to a proven offense.[9] A flagrant abuse of the District Court's power to grant such relief occurred here and this Court should correct the dangerous precedent that this decision represents.

We believe that the erroneous decision below, the procedure by which it was obtained, and the breadth and severity of the injunction sought and granted all warrant plenary consideration by this Court.

Respectfully submitted,

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[9] Cf. *Hartford-Empire Co.* v. *United States*, 323 U.S. 386, 410 et seq.; *Standard Oil Co.* v. *United States*, 221 U.S. 1, 77-82.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 11024

UNITED STATES OF AMERICA, *Plaintiff*

v.

JOSEPH A. KRASNOV, SAMUEL KRASNOV, SEYMOUR KRASNOV, THE COMFY MANUFACTURING COMPANY, FRED E. KATZNER and ARTHUR OPPENHEIMER, JR., *Defendants*

OPINION

July 30, 1956

CLARY, J.

This is an action under Section 4 of the Sherman Anti-trust Act, 15 U.S.C. § 4, brought by the United States against the above six defendants for alleged violations of Sections 1 and 2 of the Act of Congress of July 2, 1890, c. 647, Stat. 209, as amended, 15 U.S.C. § 1 and § 2. The complaint charges the defendants to be engaged in a combination and conspiracy in unreasonable restraint of interstate trade and commerce in the manufacture and sale of ready-made furniture slip covers among the several states of the United States; a combination and conspiracy to monopolize the aforesaid trade and commerce; an attempt to monopolize and a monopoly. The United States seeks an injunction to restrain the said six defendants from a continuance or revival of the alleged illegal practices and activities. The matter before the Court is plaintiff's motion for summary judgment.

Three of the defendants, Joseph A. Krasnov, Samuel Krasnov and Seymour Krasnov, are copartners in the business of manufacturing and selling ready-made

furniture slip covers, doing business under the trade name of Sure-Fit Products Co., with their principal place of buisness at Bethlehem, Pennsylvania. Hereinafter these defendants shall be referred to collectively as "Sure-Fit". The fourth defendant, The Comfy Manufacturing Company, hereinafter referred to as "Comfy", also in the business of manufacturing and selling ready-made slip covers, is a Maryland corporation, with its principal place of business in Baltimore, Maryland. The fifth defendant, Fred E. Katzner, is a resident of New York City and at the time covered by the complaint was President of Comfy and as such was actively engaged in the management, direction and control of the affairs and policies of said corporation. The sixth defendant, Arthur Oppenheimer, Jr., is a resident of Boise, Idaho, and is the patentee of U. S. Letters Patent No. 2,100,868, which patent pertains to the manufacture of ready-made furniture slip covers from knitted fabrics.

The subject matter of this action is ready-made slip covers. There are generally four types of ready-made furniture slip covers: woven fabric, woven fabric containing rubber thread, knitted fabric, and knitted fabric containing rubber thread. Such slip covers are completely manufactured at the factory in a number of basic styles adjustable for use on most sizes and shapes of upholstered chairs and sofas in common usage throughout the United States. They are so designed that they may be installed by the user following simple directions without professional guidance. They are distinguished from so-called "custom made" slip covers which are tailored for individual items of upholstered furniture by skilled professional workers who in many cases measure, cut, fit and install such covers in the home of the purchaser. When used hereinafter, the term "slip cover" shall refer to ready-made furniture slip covers.

The Pleadings

The Government alleges that since at least 1937 defendants Sure-Fit and Comfy have been the two largest manufacturers of slip covers in the United States; that in 1949 said defendants manufactured approximately 62 per cent of all slip covers manufactured in the United States; and that thirteen other manufacturers accounted for the remaining 38 per cent, of which the defendants' largest competitor accounted for only 9 per cent of the total slip covers manufactured; that during 1949 more than twenty-three million dollars worth of ready-made furniture slip covers of all types were produced in the United States; and that Sure-Fit and Comfy manufactured this pro rata percentage share of said slip covers in their factories in Baltimore, Maryland, and Bethlehem, Pennsylvania, respectively, and sold said slip covers in interstate commerce. Further, that some time in 1938, Oppenheimer transferred his title to U. S. Letters Patent No. 2,100,868 to Comfy but retained a reversionary interest therein as well as rights to royalities on slip covers manufactured thereunder.

The alleged conspiracy to evade the Sherman Act is claimed to have commenced in 1939 when, with the knowledge and consent of Oppenheimer, Comfy and Sure-Fit entered into an agreement whereby:

(a) Comfy would license Sure-Fit to manufacture and sell slip covers under the Oppenheimer patent, and Sure-Fit would cross license Comfy to manufacture and sell, to a limited number of customers, slip covers embodying the invention claimed in U. S. Letters Patent No. 1,984,973, which patent was owned by Sure-Fit;

(b) Comfy would not grant licenses to others under the Oppenheimer patent without Sure-Fit's consent;

(c) Comfy was to set the price to be maintained for slip covers manufactured under the Oppenheimer patent, and

(d) The defendants would share the expense resulting from litigation brought against alleged infringers of the Oppenheimer patent.

Further, that subsequent to said agreement, the defendants embarked on a plan whereby Comfy would threaten to institute, and institute, patent infringement suits against retail dealers selling slip covers of competitors, alleging the sale of merchandise infringing on the Oppenheimer patent. That following the institution of such suits, the defendants would endeavor to settle the suits by requiring the retailer to discontinue the sale of alleged infringing slip covers and substitute therefor slip covers manufactured by the defendants.

Finally, the complaint alleges that the defendants would injure and destroy competition of other manufacturers by:

(a) Purchasing slip covers of competitors from retailers in exchange for "full line orders" of defendants' slip covers;

(b) Reselling the merchandise of the competitors to other retail outlets at a price less than wholesale, thereby disrupting the market for their competitors and creating the impression among retailers and consumers that such slip covers were of inferior quality and workmanship;

(c) Granting special discounts, excessive advertising allowances, and abnormal return privileges to retailers who agreed to carry their merchandise exclusively, and

(d) Making or causing to be made derogatory and disparaging statements concerning their competitors' merchandise and their financial ability to defend the retailer against infringement suits which might be brought against the retailer by the defendants.

The Government alleges that the defendants combined and conspired to do these things and that said combination and conspiracy has directly and substantially been

an unreasonable restraint on interstate trade and commerce in slip covers and has assured the defendants a dominant position in the manufacturing and distribution of slip covers.

The defendants have filed separate answers in which each defendant generally denies the charges made by the Government. Whether the denial runs to facts, as contrasted to the denial of inferences drawn by the Government from facts or documents which are otherwise admitted, is a point which will be discussed later in this opinion.

The Contentions

The Government contends that it is entitled to summary judgment because the agreement entered into by Comfy and Sure-Fit was designed to eliminate competition and was inherently illegal for the following reasons:

(1) The parties agreed to pool their patents and to act jointly in prosecuting patent infringement suits which they never intended to allow to be adjudicated;

(2) The parties agreed to relinquish their individual rights to license others and acted jointly in approving or disapproving the applications for licenses;

(3) The parties agreed to price fixing, and

(4) The parties acted together to create market conditions which would eliminate competition.

In support of its allegations the Government has filed, as part of an affidavit in support of its motion, a compilation of documents consisting of 945 pages, containing 504 exhibits. Without exception, these exhibits have come from either the files of one of the defendants, their attorneys, or from the court records of patent infringement suits to which one of the defendants was a party. Except for 14 scattered documents, the authenticity of all of the Government's exhibits has been admitted by at least one

of the defendants. Allowing these documents to speak for themselves, the Government contends that these writings establish undisputed facts which prove the essential elements of the complaint and that the legal consequences to be drawn from the facts as established by the documents is the only dispute raised by the defendants' answers or counter-affidavits.

The defendants argue that this Court cannot properly grant summary judgment for the following reasons:

(1) That the Government's motion does not comply with Rule 7(b)(1) of the Federal Rules of Civil Procedure,

(2) That the Government's motion does not comply with Rule 56(c) of the Federal Rules of Civil Procedure, and

(3) That by granting this motion the Court would be depriving the defendants from establishing—by way of defense—the following facts:

(a) "The dollar-rates figure tendered by plaintiff's affidavits shows that there was no monopoly or attempt to monopolize."

(b) That there has been "freedom of entry into the slip cover market",

(c) That "the defendants did not have the power to control the market price",

(d) That "the share of the market had by the defendants was a result of consumer demand", and

(e) That "any patent infringement suits threatened or brought by the defendants against retailers and manufacturers were not threatened or brought for the purpose of harassing competitors."

The contentions of both parties will be discussed later under the heading of Discussion.

The Facts

The following statement of facts is made in the light of the provisions of Rule 56(c) of the Federal Rules of Civil Procedure. They are to be found in the written agreements between the respective parties; in admissions in the pleadings in this action; in the sworn complaints or answers in infringement suits instituted by defendants in this and other courts, and in documents, the authenticity of which have been admitted by one or all of the defendants, obtained from the files of the defendants or their attorneys, which documents include correspondence between the defendants themselves and between the respective attorneys for the various defendants, interoffice memoranda of the defendants, vouchers and bills of the defendants, and correspondence by the defendants with retailers.

Because of objections by the defendants to the consideration of the various documents outlined above in the motion for summary judgment, pre-trial procedures were availed of to determine which of the exhibits were relevant and admissible. At these hearings the Court determined that all of the documents were relevant and admissible, with minor exceptions. (These latter documents were not referred to in determining the facts.) The most serious of the objections related to the claim of privilege interposed with respect to communications between client and attorney. It was the thought of one of the attorneys that he had preserved the right of privilege for both himself and his client. Since the documents as to which such claim was made had been presented to a Grand Jury, upon a duly issued subpoena, the Court itself examined the Grand Jury minutes and determined that the documents relied upon by the Government were presented without any claim of privilege and that the record of the Grand Jury proceeding reveals that what the attorney considered to be privileged communications were removed from the file without objection by the Government and the files then

presented to the Grand Jury. The Court, therefore, determines that the claim of privilege in this case is without foundation and overrules it. As to the other documents relied upon by the Government, all of which were presented without claim of privilege, any attempt now to invoke the claim cannot be considered. The privilege once waived cannot be regained; *Rogers* v. *United States,* 340 U.S. 367, 95 L. Ed. 344 (1951). The Court therefore, determines that there is no genuine issue as to any material fact or any of the inferences which are drawn from the facts outlined below and the documentary evidence attached to, and made part of, the Government's affidavit.

Sometime prior to October 25, 1937, Arthur Oppenheimer, Jr., described by his counsel as a young man of limited financial resources, filed a patent application pertaining to the manufacture of ready-made furniture slip covers from knitted fabrics with the United States Patent Office. On October 25, 1937, while said application was pending, Oppenheimer and Comfy entered into an agreement wherein Oppenheimer assigned his rights and title to the application itself and any letters patent issued thereunder to Comfy. By the terms of the agreement, Comfy was to pay Oppenheimer a royalty of five cents for each chair and ten cents for each davenport cover manufactured and sold. In the event that Comfy did not make and sell 50,000 slip covers in any given year, Oppenheimer had the right to demand reassignment of the application or, thereafter, the patent. Comfy agreed not to sell or encumber the patent in any way and to diligently protect the patent at its own expense. In the event Comfy recovered damages from infringers it was to pay Oppenheimer 25% of the recovery; in the event that the patent was judicially declared to be invalid, Comfy was relieved from paying any future royalties. Paragraph 11 of the Agreement granted Comfy the right to grant non-exclusive licenses to others. On November 30, 1937,

Oppenheimer was granted Patent No. 2,100,868 on the aforesaid application. By assignment, dated January 17, 1938, Oppenheimer again "assigned" all his rights, title and interests in and to Letters Patent No. 2,100,868 to Comfy Manufacturing Company for the stated consideration of One Dollar. This instrument was recorded in the United States Patent Office.

While the Oppenheimer application was pending, one Walter L. Fry was granted a patent which incorporated substantially the same improvements claimed in the Oppenheimer application. Fry's patent was issued on November 2, 1937, twenty-eight days before Oppenheimer's. Shortly after the issuance of the Fry and Oppenheimer patents, Comfy and Fry issued a joint statement notifying the trade of the issuance of the patents and stating that they had exclusive rights to manufacture and sell slip covers made of knitted fabric as covered by said patents. Thereafter, the Fry patent and any question of its validity disappears from the scene until some three years later, when, as will hereinafter be set forth, it reappears in what will be called the "Rosner case".

When allegedly infringing merchandise appeared on the market, Comfy faced the difficulty of adopting a policy to protect the Oppenheimer patent. Comfy decided the least dangerous method would be to sue retail stores and it thereupon adopted the policy of starting infringement suits against a retailer only and demanding, as the condition for settlement, discontinuance of the sale of competitor's goods. Discontinuance of the sale of competitor's goods would mean, of course, the adoption of the Comfy line, if the retailer was to carry knitted fabric slip covers.

In accordance with this plan of procedure, on April 7, 1938, Comfy started a suit against Hecht's of New York charging it with the sale of merchandise infringing the Oppenheimer patent; the complaint prayed for an injunction, damages and costs. Hecht was then carrying

the Sure-Fit line. Hecht agreed to discontinue the sale of Sure-Fit products and the suit was discontinued on April 27, 1938, without damages or costs. Comfy requested that Hecht send it the following letter:

> "Our attorney has reported to us that he has arranged with your attorney to discontinue the suit brought against us charging infringement of Oppenheimer's Patent covering the sale of Knitted Slip Covers. When the papers were served on us, we investigated the matter and determined that we did not wish to handle infringing merchandise. We accordingly withdrew such infringing Slip Covers from sale immediately, and do not intend to handle them in the future. We wish to thank you for the courtesy in which you handled the situation."

because "such a letter would be of great benefit to us". Hecht complied in substance. Comfy notified retailers carrying competitors' merchandise of the filing of its suits with the intention of later circularizing the trade with letters such as the Hecht letter, or parts of them, for the purpose of discouraging retailers from carrying competing lines. Comfy was not as successful with a similar suit brought by it against Hutzler Brothers in the District Court of Maryland. Hutzler Brothers refused to sign a stipulation recognizing the validity of the Oppenheimer patent and admitting the charge that the merchandise they were handling infringed on said patent. They even refused to agree not to purchase competitors' slip covers in the future, although they did place an order for the Comfy line. The case came up for trial and the Court refused to extend the time for trial beyond March 1, 1939. Considering the whole situation "right ticklish", Comfy had the suit dismissed, even though it gained nothing; it cannot be said that the case was "settled"; Comfy had the suit dismissed because it did not want to go to trial.

At about this time Sure-Fit requested its attorney to make a complete study of the Oppenheimer patent; and,

after such a study, they were informed that there was no possibility of the Oppenheimer patent being sustained in an adequately contested suit. Sure-Fit, being the manufacturer, waited for Comfy to sue and assert the infringement claim lodged against retailers. When Comfy did not sue and Sure-Fit found its customers receiving notices of infringement and being threatened with suit, it started suit against Comfy on January 9, 1938, in the Southern District of New York, seeking to have the Oppenheimer patent declared invalid and charging Comfy with unfair competition and violation of the Antitrust Laws. On October 4, 1938, Comfy and Sure-Fit, with Oppenheimer's approval, entered into an agreement, the basic document of this conspiracy; certain provisions of which the Government alleges to be in violation of the Antitrust Laws. The Sure-Fit—Comfy suit was discontinued by stipulation of counsel three days later, October 7, 1938.

The agreement of October 4, 1938, contained twenty-five numbered paragraphs, many of which will be discussed in greater detail later in this opinion. Generally, the agreement provided as follows: Comfy granted Sure-Fit a non-exclusive license to make, use and sell slip covers under the Oppenheimer patent for a royalty of five cents on each chair and ten cents on each sofa manufactured and delivered by Sure-Fit. (Oppenheimer had meanwhile agreed to lower his royalty rates to Comfy.) Comfy covenanted not to license any other slip cover manufacturer *without the consent of Sure-Fit.* The agreement provided for *joint determination* in instituting infringement suits and the sharing of expenses for this purpose equally. Sure-Fit in turn cross-licensed Comfy to make, use and sell, to a limited number of customers, slip covers covered by Patent No. 1,984,973, which patent was owned by Sure-Fit. The parties also agreed to *maintain prices* which were established by Comfy and attached to the agreement in a separate schedule, Comfy had the right to revise the schedule at its option. Comfy was to send letter notices

of the licensing to every person and corporation that had been notified by Comfy of Comfy's ownership of the Oppenheimer patent. Oppenheimer approved the licensing agreement "in consideration of the potential benefits and advantages which said agreement represents to (him)". The Agreement was signed by Oppenheimer. All of the parties, Comfy, Sure-Fit and Oppenheimer, entered into this agreement at a time when the question of the validity of the Oppenheimer patent had not been determined and, in fact, after all parties concerned had clearly agreed never to permit judicial determination of its validity, as reflected by a subsequent and continuous course of action.

The motivation for this agreement can best be summarized by the often quoted remark "If you can't beat them, join them". Comfy wanted to avoid any possibility of testing the validity of the Oppenheimer patent; Sure-Fit had lost Hecht's and would undoubtedly lose a number of other customers who were being threatened with infringement suits. A Chicago account of Sure-Fit, Goldblatts, was already being sued by Comfy and for jurisdictional purpose Sure-Fit felt it best not to defend for Goldblatts. If these two manufacturers were to enter into an agreement whereby each would be assured that it could keep its present accounts without fear of competition from the other and, if by joint force, they could venture into the trade with threats of infringement suits against customers of competitors, their mutual and individual interests would be served. The alternatives offered by adjudication of the Sure-Fit—Comfy suit were of no particular advantage to Sure-Fit and they were somewhat frightening to Comfy. Comfy would gain all or lose all, and here the certainty of Sure-Fit's attorney as to the invalidity of the Oppenheimer patent must not be minimized; Sure-Fit would, at best, create a wide open field if it were successful. That a deliberate division of the trade was intended (and achieved) by the defendants is proved by a letter written in August of 1940 by Comfy to Fred A. Klein, Esquire,

its attorney, wherein Comfy complained that Sure-Fit had crossed the line and offered a price reduction to one of Comfy's customers. Comfy wrote that while violations as to price reduction, directly and indirectly, existed from the first, these violations were not offensive and had not been made "an issue" because they were "confined mostly to Sure-Fit's own customers". The retail price was being maintained despite these violations and Comfy felt that "no real harm was being done by such violations". Further, Comfy wrote that it also found it necessary to deviate as to prices from time to time among its own customers but felt that if they were to encroach upon each other's accounts then there was "no purpose" in continuing the agreement. To correct this breach, which occurred nearly two years after the signing of the agreement, it was suggested that "the best solution would be a verbal reaffirmation of the purposes of the agreement. We must both understand and agree that an occasional reduction in price or other inducement may be necessary because of some local situation or competition with nonlicensed manufacturers. However, we must definitely understand each other that we cannot approach each other's accounts with inducements".

After the defendants entered into the agreement, they followed the above course as to each other's customers, they joined in policing and checking the trade, they were in constant contact with each other, and they would inform each other of any price violation which came to their attention. They jointly informed the trade of Sure Fit's licensing by sending out two separate mailings of 1,836 letters each. Comfy sent a letter to Amerling & Angello, Esquires, attorneys for Hecht Bros., informing them of Sure-Fit's license and inviting them to return to Sure-Fit: "In view of this license, Hecht Bros. is at liberty to purchase such slip covers from Sure-Fit Products Company."

Comfy and Sure-Fit circularized the trade generally and sent letters to individual retailers selling competitors' merchandise, threatening them with suit unless they discontinued the sale of such merchandise. They recognized and took full advantage of the almost universal aversion of a retailer to patent litigation and their suits were brought for the purpose of having the retailer discontinue a competitor's line and adopt theirs; they had no interest or intention of adjudicating the validity of the Oppenheimer patent. They sought consent decrees from stores which could be represented as acknowledgment or adjudication of the validity of the Oppenheimer patent. Letter agreements not to handle competitors' products were accepted from a retailer and the suit was then discontinued. When the retailer would handle such merchandise again, the defendants sued on the letter agreements rather than for infringements. In general, the pattern of the Hecht and Hutzler suits was followed.

Ten suits were instituted against retailers without the validity of the Oppenheimer patent ever being adjudicated. The defendants tolerated continuous alleged violations of the Oppenheimer patent despite the fact that an adjudication of its validity would have been a complete answer to their problem. They never collected damages for past alleged violations and they never collected expenses for any of their suits from retailers. Their gain was the addition of another customer at the expense of some other manufacturer.

Four suits were instituted against manufacturers directly. The first was against Med-Vogue Corporation in the Southern District of New York. This suit was started by Comfy on October 13, 1938, just nine days after the agreement between Comfy and Sure-Fit was reduced to writing and signed. Med-Vogue filed an answer and a counterclaim in which it asserted that the Oppenheimer patent was invalid for various reasons, that the

suit was instituted solely for harassing purposes, and that Comfy, Sure-Fit and Oppenheimer, knowing that the Oppenheimer patent was not valid, entered into an agreement for the purpose of threatening and intimidating retailers with the effect, and for the purpose, of deterring and preventing them from purchasing Med-Vogue covers. Comfy alone was the plaintiff in the suit; Med-Vogue's counterclaim included Sure-Fit. The suit and counterclaim were discontinued on June 7, 1939, after an agreement had been entered into by the parties. The agreement provided that Med-Vogue would discontinue the sale of knitted slip covers, that the respective rights of both parties to manufacture woven slip covers would remain unchanged, that Med-Vogue was released from liability for any possible past infringements, and that Comfy would purchase Med-Vogue's inventory and machinery for $8,309.36, plus $1,500. for finished slip covers on hand. This "settlement" cost the defendants nearly $10,000; $500.00 was contributed by Oppenheimer and the balance was borne equally by Comfy and Sure-Fit.

The second suit against a manufacturer, Vatco Manufacturing Company, was instituted in January, 1939. It was brought about by a combination of circumstances which left Comfy no alternative but to institute suit. Comfy circularized Vatco's customers with infringement notices and threats of suit. Vatco, by letter dated October 21, 1938, wrote Comfy that it believed the Oppenheimer patent to be invalid and it invited Comfy to sue for infringement. When, by early December, Comfy did not institute suit, Vatco circularized the trade, advising that it believed Patent No. 2,100,868 to be invalid, that it had sent a registered letter to Comfy calling upon Comfy to sue Vatco, that no suit had been brought, that Comfy's circular was for the mere purpose of intimidating the retailer and that Vatco would, upon request, give any of its customers a letter guaranteeing the customer against all actions for infringement of the Oppenheimer patent.

Vatco also referred to its financial standing as a guarantee of its strength. This case was settled by an agreement wherein Vatco was to pay Comfy a certain amount of money, and Comfy was to stop sending circular letters to Vatco's customers, was not to sue Vatco or its customers for infringement, unless the patent was first adjudicated, and it was to send a notice to Vatco of any suits started involving infringement of the Oppenheimer patent. Vatco's future was then clear except for the possibility that the patent would be adjudicated to be valid, in which event it would find itself liable for all damages from the date of the agreement.

The third suit against a manufacturer was brought in June, 1941, against the Malden Novelty Co., Inc. Service was quashed for want of jurisdiction and the defendants never attempted to reinstate the action.

The fourth suit instituted against a manufacturer had some unforeseen results. The financial strength of Dyer-Gruen-Jackson, Inc. was carefully checked and when it was found that it was weak and, in fact, almost out of business, it was decided to institute suit against that company. The complaint was filed on June 18, 1941, in this Court and Dyer-Gruen-Jackson, Inc. answered. Then, to the surprise of the defendants, Louis Rosner moved to intervene as a defendant in the action. The motion alleged that Rosner, doing business under the trade name of Franklin Cushion and Drapery Company, was engaged in the manufacture of slip covers, as a sublicensee of Dyer-Gruen-Jackson, Inc. under the Fry patent referred to above, and that Dyer-Gruen-Jackson, Inc. itself was no longer manufacturing slip covers. The court granted the motion and Rosner was made the defendant. Rosner filed an answer and counterclaim; Comfy moved to strike the counterclaim, and Rosner moved for summary judgment. With Oppenheimer's and Sure-Fit's approval, an agreement was entered into between Comfy and Rosner,

on Rosner's terms. Rosner received a substantial sum in settlement and he received a license under the Oppenheimer patent. By the terms of the agreement, Rosner was granted a nonexclusive license; he was exempt from paying royalties on knitted slip covers of the type he had been manufacturing and as to other types of knitted slip covers he was to pay a flat 2% royalty on the net selling price of each unit, but no royalties were due for the first $37,500. of net sales annually. The royalties received from Rosner were divided in equal thirds by Comfy, Sure-Fit and Oppenheimer, and Sure-Fit's royalties were substantially reduced. Settlement of this suit constituted a total loss at great expense to Comfy, Oppenheimer and Sure-Fit, despite the fact that the latter had its own royalties reduced. Adjudication of the validity of the Oppenheimer patent was avoided, however.

Comfy instituted suits against Gimbel Brothers, A. I. Namm & Sons, Selrite, Inc., Mandel Brothers, Inc., C. F. Hovey Company, Frank and Seder, and three suits against Lit Brothers, all retailers. Generally the effect of these suits was to force the retailers to discontinue purchase of competing lines. Those cases in which the retail defendant showed any aggressiveness in the defense, the suit was discontinued for lack of prosecution. In no case was there any adjudication on the merits. The result of the present defendants' suits against detendant retailers, carefully chosen by them, was calculated to and did extend their dominion in the slip cover field.

Discussion

Before venturing into the vast number of arguments advanced by both sides on the merits of this case, it would be well to dispose of the two procedural arguments advanced by defendants.

The first is defendants' contention that the motion for summary judgment must be denied for lack of compliance

with Rule 7(b)(1) of the Federal Rules of Civil Procedure. Rule 7(b)(1) provides as follows:

"(b) *Motions and Other Papers.*

(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, *shall state with particularity the grounds therefore,* and shall set forth the relief or order sought . . . ." (Emphasis supplied.)

Defendants contend that the Government's motion does not set forth the grounds upon which it seeks summary relief. With this I cannot agree. I do not consider this rule to establish a mere technical requirement but rather hold it to be "real and substantial". *Steingert, et al.* v. *National City Bank of New York,* 36 F. Supp. 18, (D.C. S.D.N.Y. 1941). A reading of the motion, however, can leave no doubt as to the theory upon which plaintiff is proceeding. After listing the pleadings and papers upon which the Government relies the motion "moves the Court pursuant to Rule 56 of the Federal Rules of Civil Procedure for summary judgment". Rule 56 completely sets forth the procedure and basis for granting summary judgment in Federal practice. When a motion is so explicit, the grounds therefore have been set forth with particularity within the meaning of Rule 7(b)(1) of the Federal Rules of Civil Procedure. *Galdi* v. *Jones,* 141 F. 2d 984, (C.C.A. 2, 1944).

As to the second procedural point, the principal argument advanced by the defendants is twofold. First, that on the present record, the case is not susceptible of disposition on motion for summary judgment, and, secondly, that plaintiff's affidavits and exhibits thereto create genuine issues of material fact which compel denial of its motion for summary judgment. Great reliance has been placed upon the decision of the United States Court of Appeals for this Circuit in *Frederick Hart & Co.* v. *Record-*

graph Corporation, 169 F. 2d 589 (1948). In that case the court held that affidavits filed in support of motions for summary judgment may be considered for the purpose of ascertaining whether an issue of fact is present but that they cannot be used as a basis for deciding the fact issue.

I do not see the applicability of the *Frederick Hart* case to the situation which confronts the Court in this case. The Government has established by the introduction of *documentary evidence* all of the facts necessary to establish its case. The correctness and authenticity of each document, which cover some 945 written pages, have been admitted by at least one of the defendants involved in this action. That there was a combination between the parties cannot be gainsaid. Their admitted formal written agreements establish that no party has attempted to challenge them. The documents cover the entire period of operation, were made concurrently with the events which they purport to portray and, since they are *genuine documents*, no issue of fact can arise with respect to any particular document which might in anywise cast doubt upon or weaken the effect of other documents. The United States Court of Appeals for this Circuit has approved the use of documentary evidence in determining affirmative facts necessary to the decision of a matter and has upheld the use of such documentary evidence in taking a case away from the jury; *Croll* v. *John Hancock Mutual Life Insurance Co.*, 198 F. 2d 562 (1952). The Supreme Court of the United States in *Associated Press* v. *United States*, 326 U.S. 1, has likewise approved the use of documentary evidence in motions for summary judgment in Antitrust cases. In the case of *Morton Salt Co.* v. *G. S. Suppiger Co.*, 314 U.S. 488 (1942), the Supreme Court affirmed the action of the District Court in granting defendant's motion for summary judgment on the basis of facts which had come before it clearly evidencing lack of merit in plaintiff's contention. It appears, therefore,

that the doctrine of the *Frederick Hart* case, supra, is no bar to summary judgment in this case, if the undisputed documents show a conspiracy to restrain trade and monopoly, acts done in accordance with the conspiracy and harmful effects upon trade in the particular industry. That all of these requirements are met in this case will appear clearly as the opinion progresses.

The further objection that these documents might not be admissible in evidence has also been carefully considered by the Court. As before stated, the only objection which gave the Court any difficulty went to the question of privilege. That objection of the defendants has been resolved in favor of the Government. There has been no violation of privilege in this case. Further, communications with third parties, as contrasted to those between the various defendants, are clearly relevant and admissible. Once having established the fact of conspiracy any writings of the parties in furtherance of the conspiracy, whether between themselves or third parties, are relevant and admissible against all of the defendants. I, therefore, have no difficulty in concluding that all of the documents are relevant and admissible and all will be used, except as otherwise noted above, in the determination of this issue.

The next question to be determined is whether or not this matter is one to be appropriately disposed of by summary judgment. There can be no doubt that summary judgments are as applicable to actions under the Sherman Act as they are to any other type of actions, legal or equitable. *Associated Press* v. *United States*, 326 U.S. 1 (1945); *Morton Salt Co.* v. *G. S. Suppiger Co.*, 314 U.S. 488 (1942); *International Salt Co.* v. *United States*, 332 U.S. 392 (1947); *United States* v. *Gypsum Co.*, 340 U.S. 76 (1950). Under Rule 56(c) of the Federal Rules of Civil Procedure a motion for summary judgment may be granted only

". . . if the pleadings, depositions and admissions on file, together with the affidavits, if any, show that there is *no genuine issue as to any material fact* and that the moving party is entitled to a judgment as a matter of law."

Thus, in the matter before the Court, I may grant the Government's motion and enter judgment in its favor if: (1) All of the pleadings, affidavits and exhibits show that there is no genuine issue of fact whatsoever existing between the parties, any dispute between them going only to the legal significance to be given to such facts, or (2) since the complaint sets forth a number of allegations, any one of which, standing alone, would warrant a finding that defendants have violated the provisions of the Sherman Act. I may likewise determine whether the documentary evidence clearly supports the alleged "per se" violations of the Antitrust laws.

Price-Fixing

The Government has charged that the defendants' agreement and conduct in relation to price-fixing was, from the beginning, illegal per se, citing a number of cases in support of its contention. The Court will limit its consideration to the main argument which develops from the language in *United States* v. *General Electric*, 272 U.S. 476 (1926); *United States* v. *Unives Lens Co.*, 316 U.S. 241 (1942), and *United States* v. *Line Material Co.*, 333 U.S. 287 (1948). The defendants also place great reliance upon *United States* v. *General Electric*, supra. That case involved an agreement between General Electric and the Westinghouse Company through which Westinghouse was licensed to manufacture incandescent light bulbs under a number of General Electric's patents, on condition that it should sell said bulbs at prices fixed by General Electric. The price agreement was upheld as a valid exercise of patent rights. The court said:

"When a patentee licenses another to make and vend, and retains the right to continue to make and vend on

his own account, the price at which his licensee will sell will necessarily affect the price at which he can sell his own patented goods. It would seem entirely reasonable that he should say to the licensee, "Yes, you may make and sell articles under my patent, but not so as to destroy the profit that I wish to obtain by making and selling them myself."

As in the instant case, the General Electric case has often been cited as authority to support diametrically opposing contentions.

In *United States* v. *Line Material Co.*, supra, Mr. Justice Reed devoted some time to a consideration of the General Electric case, but refused to define its limits or interpret the basis for its rule. His stated reasons for not doing so was that a majority of the court could not agree on the basis for affirming its rule, nor was there a majority to overrule it. The Line Material Co. case still left undecided "the many variables of the General Electric (case) that may arise". One of these variables is presently before the Court. Quoting Mr. Justice Reed:

> "Where a conspiracy to restrain trade or an effort to monopolize is *not* involved, (the General Electric case holds that) a patentee may license another to make and vend the patented device with a provision that the licensee's sales price shall be fixed by the patentee."

I need not decide this variable, however; the conduct of the defendants pursuant to the agreement renders it unnecessary. The price arrangement was not executed in a manner so that its purpose can be said to have been the protection of the patentee's monopoly with, of course, the necessary incidental benefits accruing to the licensee; but rather it was used as a two-edged implement to cut equally for the benefit of both the licensor and licensee. Comfy complained to Sure-Fit when one of the latter's customers failed to maintain the retail price and Sure-Fit sent out a salesman to adjust the matter; Sure-Fit in like

manner and with apparent equal right watched Comfy's customers. It complained about Gimbels, Strawbridge and clothier, and Goldbatt's. Comfy replied to the complaints and assured Sure-Fit that it would take steps to adjust these matters, and thereafter Comfy kept Sure-Fit advised of its progress along these lines. They each had an interest in maintaining a set retail price and they each took action towards that end. The agreement operated equally for the benefit of the patentee and the licensee and does not fall within the rule of the General Electric case, as such. There is no question that the agreement potentially tended to eliminate competition and was an unreasonable restraint on trade within the meaning of the Sherman Aantitrust Act.

The Government has also shown the power of the defendants to control prices in this particular field and how it was accomplished. It would be extremely difficult for the defendants ever to argue in view of a letter dated August 11, 1949, defendant Katzner wrote to Sure-Fit (Government Exhibit 502) that no such power existed. Part of the letter reads as follows:

> "*One* of the major benefits derived from the patent has been the fact that it has been completely respected by Sears and Wards, and we have enjoyed an excellent volume of business with these mail-order houses. On numerous occasions, *competitors have offered them infringing covers at prices much lower than ours.* However, because it is the definite policy of these two firms to respect patent rights, such offerings have been rejected." (Emphasis supplied)

That the defendants actually fixed and maintained prices is clearly evidenced by documentary exhibits showing that where retailers such as Strawbridge and Clothier and Gimbels, large department stores in Philadelphia and vicinity, were selling products of one of the two defendant companies at lower prices than had been agreed upon, the attention of the respective manufacturer was called

to this situation and each in turn not only agreed to but did bring the retail level back to the agreed prices. The patently illegal price feature of the program, it is true, was cancelled in 1942, but the documentary evidence in the case clearly demonstrates that while cancelled as a formal provision of the contract, it was, in fact, followed in practice. The few times that the deviation from agreed prices occurred demonstrates clearly that each of the defendant companies was extremely solicitous to see that retail prices were maintained at agreed levels.

Cross-Licensing

Next, the Government contends that it is entitled to summary judgment because of the illegality of the cross-licensing agreement of Comfy and Sure-Fit. The defendants argue that cross-licensing is permissible under the holding of *Standard Oil Co.* v. *United States*, 283 U.S. 163 (1931), the leading case on patent pooling and cross-licensing. Prior to the Standard Oil decision, the case law was hopelessly confused and divided along two lines: One, emphasizing the narrow exception of the "legal monopoly" granted by patent law, and the other emphasizing the prohibition of "unlawful restraint" imposed by Anti-trust law. Mr. Justice Brandeis established the rule that a pooling arrangement or cross-licensing between competitors is not illegal in and of itself, but that it may become illegal if it is part of a larger plan to control interstate markets, stating

> "Such contracts must be scrutinized to ascertain whether the restraints imposed are regulations reasonable under the *circumstance*, or whether their *effect* is to suppress or unduly restrict competition."

Here, the defendants were the two largest competitors in the industry and dominated it dollar-wise. They fixed and maintained prices, they controlled the key patents in the industry, they shared the cost of infringement suits, and

neither granted rights under the said patents to any third parties until they found it necessary to do so, at which time they did so by mutual consent in accordance with their agreement. Under these circumstances I think the defendants were well beyond the protection afforded by patent grants. I need not determine cause and effect as between the *agreement* and the *circumstances;* it is sufficient to note that their combined effect was to stifle competition.

Right to Jointly Determine Maintenance of Infringement Suits

The Government alleges that two other provisions of the licensing agreement between Comfy and Sure-Fit render it illegal. It is the Government's position that Paragraph 11 of the Agreement grants Sure-Fit the right to prohibit Comfy from licensing others and that Paragraph 6 provides for joint determination in instituting infringement suits and that such a grant and provision are illegal because they establish an effective means by which the defendants could restrain trade in violation of the Anti-trust laws. The defendants answer that these provisions of the licensing agreement are sanctioned under Patent law and that, as such, they are immune from the Anti-trust laws. These provisions are treated separately in the Government's briefs and are answered accordingly by the defendants. Because of their interrelation I shall consider the two together.

Paragraph 11 reads:

> "The Licensor (Comfy) covenants and agrees that it will not grant unto others any right or license, expressed or implied, under the said (Oppenheimer) Letters Patent as long as the Licensee (Sure-Fit) holds this license, nor will Licensor sell such slip covers to slip cover manufacturers."

Paragraph 6 reads:

> "Should infringements of the said Oppenheimer patent appear in the market, the Licensor and Licensee shall jointly determine whether or not suit shall be instituted. All disbursements, costs and expenses in connection with such suits shall be subject to the joint determination of the Licensor and Licensee and all such disbursements, costs and expenses, before incurred shall have the approval of both Licensor and Licensee. In the event Licensor and Licensee does not approve of suit or of a particular disbursement, cost or expense, the other party may in its discretion, at its own expense, proceed with such suit or expenditure. The disbursements, costs and expenses of such suit, when so approved, shall be borne equally by the Licensor and Licensee and any contribution by Arthur Oppenheimer, Jr. shall be credited to such disbursement, costs and expenses."

At this point in their briefs, both counsel are poles apart in their treatment of these clauses. The Government describes the grant by Comfy to Sure-Fit as a "non-exclusive license" and the defendants give it the appellation of "exclusive license". Upon this major premise, each respective conclusion is irrefutable. The Government's argument stems from *Crown Die and Tool Company* v. *Nye Tool & Machine Works*, 261 U.S. 24 (1923). In that case, the plaintiff, who sought to enjoin an alleged infringement of a screw-threaded cutting device, claimed as the basis of his right to sue an assignment from the patentee which granted him no other rights under the patent. Mr. Chief Justice Taft, discussing at great length the rights of a patentee under our Federal Patent Laws, concluded that the right to make, use and vend an invention are rights derived from common law, as based on natural law, and that all the Government grants a patentee is the right to exclude others from making, using or vending his invention. He reasoned, however, that this right to exclude others is not assignable in and of itself,

for it is merely an incident of the common law right to make, use and vend, and that the incident of exclusive enjoyment is government protected only if a person (patentee or asignee) has also the right itself. A licensee, though he does not have legal title, also acquires the incident of exclusive enjoyment, which right is coextensive with whatever right to make, use or vend he may have. It follows that although a licensee cannot sue in his own name where he has a license to be the exclusive maker, user, or vendor under a patent (an exclusive licensee), he has the power to compel the patentee to protect his incident of exclusive enjoyment and he may thus join the patentee in a patent infringement suit. *Independent Wireless Telegraph Company* v. *Radio Corporation of America,* 269 U.S. 459 (1926), opinion by Chief Justice Taft. *Western Electric Co., Inc.* v. *Pacent Reproducer Corp.*, 42 F. 2d 116 (C.C.A. 2d, 1930), applies this same rule where the licensee was granted all rights under the patent, except for a reservation of the right to practice the invention on the part of the licensor. The court still termed such a holder an "exclusive licensee". Thus, under Patent law, where one is an "exclusive licensee" he has a right to exclude others as an incident of patent monopoly and he does not run afoul of the Antitrust laws.

Here, the defendants claim that Sure-Fit is an "exclusive licensee" because the licensing agreement granted to Sure-Fit all rights under the Oppenheimer patent save the right which Comfy reserved for itself. This being so, it is contended that they could legally spell out in the agreement that which the law otherwise allows. With this I must agree. But, it is to be remembered that Comfy was not the patentee of the Oppenheimer patent; it was an assignee. We must, therefore, look to see what rights were vested in Comfy for, if it did not have the power to grant Sure-Fit an exclusive license, the defendants' argument is of no avail.

Under date of October 20, 1937, Oppenheimer and Comfy entered into an agreement whereby Oppenheimer assigned his then pending patent to Comfy; this agreement contained 19 numbered paragraphs which covered six double-spaced typewritten pages. The agreement contained provisions for royalties, the keeping of records and accounts, infringement suits, assignments by Comfy to third persons, licensing by Comfy of third persons and the automatic reassignment of the patent under certain conditions. On January 17, 1938, Oppenheimer, for the recited consideration of One Dollar, signed a single page written agreement, termed, "Assignment", which was recorded in the United States Patent Office in accordance with patent law requirements. The agreement of October 20, 1937 was referred to in this instrument. The provision covering licensing is contained in Paragraph 11 of the Oppenheimer-Comfy agreement and it reads:

> "Comfy shall have the right to grant unto other non-exclusive, nonassignable licenses to make and sell such slip covers, but all such licenses shall be subject to the terms of the agreement and Comfy shall be responsible for payment unto Oppenheimer by such licensees the royalties mentioned in Paragraph 4 herein."

The Government contends that because of this provision Comfy had no power to grant an "exclusive license" to Sure-Fit when it entered into the agreement with Sure-Fit; the power was given to Comfy and the rights to Sure-Fit, because of Oppenheimer's joinder in the latter agreement, which to that extent abrogated the October 20th Oppenheimer-Comfy agreement. The defendants take the position that the assignment by Oppenheimer to Comfy was effected by the agreement of January 17, 1938, the "Assignment" which is recorded, and not by the prior agreement. With this I cannot agree. As between the parties, the statutory requirement of recording is of no consequence. Where there are no intermediary interests affected, recordation has no bearing on the results of a

suit; *Hook* v. *Hook and Ackerman*, 187 F. 2d 52 (C.C.A. 3, 1951). No particular form is required for the assignment of a patent interest and patent assignments are subject to the same rules of construction that apply to contracts generally, the intention of the parties being of primary concern in construing them; *Crosley Radio Corporation* v. *Dart*, 160 F. 2d 426 (C.C.A. 6, 1947). The agreement of January 17, 1938 does not stand alone; the defendants cannot be heard to say that the limitation on licensing is without effect any more than they could avoid the paying of royalties by using the same reasoning. The only remaining question is the effect of the limitation on licensing. As part of the agreement between Oppenheimer and Comfy it must be given effect; does this, however, have the effect of reducing Comfy to something less than an assignee? I think not. *Waterman* v. *Mackenzie*, 138 U.S. 252, the leading case on the subject of patent assignments and licenses, establishes the principle that the "exclusive right to make, use and vend the invention or discovery" is one entire thing and cannot be divided by law. "The patentee or his assigns may, by instrument in writing, assign, grant or convey, either (1) the whole patent, comprising the exclusive right to make, use and vend an invention throughout the United States; or (2) an undivided part or share of that exclusive right; or (3) the exclusive right under the patent within and throughout a specified part of the United States . . . Any assignment or transfer, short of one of these, is a mere license. . . ." The case also points out that whether the interest transferred is an assignment, or a license, does not depend upon the name by which it is called, but upon the legal effect of its provisions. There is no limitation that an assignment must be made in or by one written instrument. An assignment is not invalidated because there is a reservation of royalty; *Rude* v. *Westcott*, 130 U.S. 152; and *Evans* v. *Kavanagh*, 86 F. Supp. 535 (D.C. E.D. Mich. 1949) held a transfer of pat-

ent rights to be an effective assignment even though it was coupled with a licensing back provision with the power to assign such license to one other person. I think that although the provisions of the Oppenheimer-Comfy agreement may be one step more removed than the Evans case, it is still within the doctrine of the Waterman case. Comfy is therefore an assignee. Thus, when viewed as a whole, as indeed it should be under *United States* v. *Patten*, 226 U.S. 525, the Court notes here a situation where no one, the patentee, the asignee, or the licensee, can create any rights under the patent in any other person without the consent of the other two. The owner of the patent and the two dominant manufacturers in the trade have so bound themselves. Although these facts are not identical with those in *United States* v. *Besser Mfg. Co.*, 96 F. Supp. 304 (1951), affirmed 343 U.S. 444, I think the evil which the court there struck down exists here, namely, (1) the veto power over licensing rights granted to a licensee and (2) the contractual arrangement which created the power to restrict competition by requiring joint consent before others could be licensed.

From what has been said before, it is clear that all of the parties hereto, including Oppenheimer and Katzner, were actively engaged in a conspiracy to assure continued domination of the slip cover market in the United States. Katzner, as various exhibits disclose, was closely associated with almost every action taken to effectuate the conspiracy and was particularly active in the maintaining of retail prices. Oppenheimer's activities in the conspiracy were not nearly as pronounced as that of the other five defendants but nevertheless formed a necessary part of the whole. He readily acquiesced in reduction of patent royalties whenever necessary to end litigation which would determine the validity of the patent. Furthermore, he contributed to the legal expenses involved in the harassing suits and in one instance con-

tributed substantially toward defendant Rosner's legal fees to avoid a real test of his own patent.

The assertion of the defendants that in granting this motion the Court is depriving them of the opportunity of establishing by way of defense the factual defenses alluded to before including the statement "that any patent infringement suits threatened or brought by the defendants against retailers and manufacturers were not threatened or brought for the purpose of harassing competitors" is without merit. No defendant has denied the doing of the acts of which there is documentary proof in the record. No defendant has undertaken to deny the existence of expressed attitudes in letters between themselves which reflect their respective understandings of the agreement. The attitudes referred to in the preceding statement cover maintenance of retail prices; threats of patent infringement suits to keep competitors from doing business with large establishments such as Sears Roebuck and Company and Montgomery Ward and Company; the advisability of suing retailers only; the advisability of settling suits to avoid the ultimate test of the worth of the patent, its validity; and the payment of attorney's fees of their competitiors in the industry. With every document admitted as genuine, it would be futile for the defendants at this late date to attempt to explain away the contents of documents which so clearly express the actual business transactions of the respective defendants.

Conclusion

That the defendants in combination controlled the market and had the ability to and did drive competitors from the business of manufacturing knitted fabric slip covers is abundantly clear from the record. That the defendants in combination fixed and maintained prices is likewise crystal clear. That the defendants in combination and cross-licensing created a situation in the industry which, particularly by agreement for joint action respecting the patents, effectively hindered newcomers in the

field, is also established beyond peradventure of doubt. That the harassing suits against competitors, previously discussed in some detail, were designed as and were actually only harassing suits is clear from an examination of the correspondence between the parties and the Court feels that such conclusion is inescapable from an objective analysis of the documents. All of these actions taken in concert constitute a clear violation of the Sherman Antitrust Act and the Government has established to the satisfaction of the Court that the combination and conspiracy above referred to represents an unreasonable restraint of trade and commerce among the several states of the United States in the manufacture and sale of ready-made furniture slip covers, is unlawful, and in violation of Section 1 of the Sherman Antitrust Act. Further, the Government, in the opinion of the Court, has effectively demonstrated that the defendants combined and conspired not only to restrain trade unreasonably but also to monopolize trade and commerce among the several states of the United States in the manufacture and sale of ready-made furniture slip covers, in direct violation of Section 2 of the Sherman Antitrust Act. The Court also feels that by documentary proof the Government has established that the defendants have used patent rights unlawfully in instituting, effectuating and maintaining the aforesaid combination and conspiracy which likewise constitutes a clear violation of the Sherman Antitrust Act.

Since the Court holds that the Government is entitled to relief, the question as to the extent of the relief required to eliminate the practices complained of will require further consideration by the Court. The Government will present a proposed form of decree within 40 days from the date of this opinion to which the defendants may file objections or exceptions within 20 days thereafter. The Court will then hold an open hearing as to the form of the decree to be finally entered and thereafter will issue its final order.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

No. 11024

UNITED STATES OF AMERICA, *Plaintiff*

v.

JOSEPH A. KRASNOV, SAMUEL KRASNOV, SEYMOUR KRASNOV, THE COMFY MANUFACTURING COMPANY, FRED E. KATZNER and ARTHUR OPPENHEIMER, JR., *Defendants*

FINAL JUDGMENT

This cause came on for hearing before the Court upon the motion by the plaintiff pursuant to Rule 56 of the Federal Rules of Civil Procedure for summary judgment in its favor, counsel for the parties having been heard and the Court having determined upon consideration of the pleadings, the admissions, and exhibits on file, that there is no genuine issue between the parties as to any material fact, and the Court having filed its opinion herein on July 30, 1956 granting the motion by plaintiff for summary judgment against all the defendants;

NOW, THEREFORE, after hearing plaintiff and defendants by their attorneys, it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

I.

(A) "Defendants" means each and all of the parties defendants as named in the complaint in this cause;

(B) "Slip cover" means any ready-made furniture slip cover except such covers as are sold in several separate pieces and assembled by the user on chairs, sofas, davenports and the like (commonly designated as DO-IT-YOURSELF-KITS);

(C) "Person" means any individual, corporation, partnership, association or other business or legal entity;

(D) "Patents" means all United States Letters Patent relating to the manufacture, use or sale of slip covers.

II.

The provisions of this Final Judgment applicable to any defendant shall apply to such defendant, its or his officers, agents, servants, employees and attorneys, and to all other persons acting or claiming to act under, through or for such defendant who shall have received actual notice of this Final Judgment by personal service or otherwise.

III.

Defendants have violated Sections 1 and 2 of the Act of Congress of July 2, 1890, 15 U.S.C., Sections 1 and 2, entitled "An act to protect trade and commerce against unlawful restraints and monopolies", commonly known as the Sherman Act. Said violations have consisted of defendants engaging in an unlawful combination and conspiracy in restraint of trade and commerce in the manufacture and sale of slip covers, entering into unlawful contracts, agreements and understandings in restraint of said trade and commerce and unlawfully combining and conspiring to monopolize said trade and commerce in the manufacture and sale of slip covers.

IV.

The agreement among defendants, dated October 4, 1938, and all agreements supplementary and mandatory thereto are adjudged and decreed to be unlawful and are hereby terminated; and defendants are jointly and severally enjoined and restrained from the further performance or enforcement of any of the provisions of said agreement or the agreements supplementary and amendatory thereto.

V.

Defendants are jointly and severally enjoined and restrained from combining or conspiring, or from entering into, adhering to, performing, maintaining, furthering, directly or indirectly, or claiming any rights under any contract, agreement, understanding, plan or program with any other person to:

(A) Fix, maintain or adhere to the price of slip covers sold to third persons, except as provided by the "Miller-Tydings" and the "McGuire" Acts and the "Fair Trade" Laws of any States or Commonwealth;

(B) Monopolize or attempt to monopolize the manufacture, distribution or sale of slip covers.

VI.

Defendant are jointly and severally enjoined and restrained from:

(A)(1) Purchasin slip covers manufacturing by any other person and disposing of such slip covers in such a way as to disclose the identity of the manufacturer thereof, or (2) reselling such slip covers at prices less than wholesale and thus or otherwise disrupting the market of the manufacturer of such slip covers or creating the impression among retailers or consumers that such slip covers are of inferior quality or workmanship;

(B) Making or causing to be made false, derogatory or disparaging statements concerning slip covers manufactured by others or false statements concerning the financial ability of any other manufacturer of slip covers;

(C) Granting to any retailer of slip covers special discounts, advertising allowances or return privileges which are not available to others on proportionately equal terms;

(D) Entering into any contract or understanding with a retailer of slip covers obligating the latter to carry

exclusively slip covers manufactured by the defendant, or not to carry or deal in slip covers manufactured by others. However, this provision shall not apply to an agreement with the owner of an individual store in any city having a population (based on the last official Decennial Census) of less than 25,000 inhabitants;

(E) Entering into or enforcing any contract or understanding with any supplier of materials for slip covers obligating such supplier to refrain from manufacturing for or selling to others any such materials, except that such defendant may contract for certain fabrics and fabrics containing certain designs or patterns for the exclusive use of the defendant;

(F) Purchasing jointly with any defendant, from any other manufacturer of slip covers, machinery usable in the manufacture of slip covers.

VII.

Defendants are jointly and severally enjoined and restrained from:

(A) Instituting or threatening to institute, or maintaining or continuing any action or proceeding for acts of infringement or use or to collect damages, compensation or royalties alleged to have occurred or accrued prior to the date of this Final Judgment, under any patents owned or controlled by any defendant, except by way of set-off or counterclaim in any action brought by any third party against any defendant or defendants;

(B) Instituting, threatening to institute or maintaining any action or proceeding for acts of infringement or use of any patent owned or controlled by such defendant against any retailer of slip covers who is not also the manufacturer of the alleged infringing slip covers;

(C) Sharing with any other defendant expenses resulting from any action or proceeding for acts of infringe-

ment or use of any patent owned or controlled by any defendant;

(D) Instituting or threatening to institute any action or proceeding attacking the validity or scope of any patent for the purpose or with the effect of harassing a competitor or owner of said patent, except by way of defense, setoff or counterclaim in any action brought by any third party against any or all defendants.

VIII.

This Court having found that the defendants have used patent rights unlawfully in instituting, effectuating and maintaining the illegal combinations and conspiracies and that defendants instituted and threatened to institute harassing infringement suits against competitors and retailers of slip covers, and in order to prevent such misuse of patent rights and the institution of such harassing infringement suits in the future;

(A) Each defendant is ordered and directed, in so far as it has the power to do so, to grant to any applicant therefor a nonexclusive license under any, some or all of the patents owned or controlled by such defendant at the date of entry of this Final Judgment or which are applied for or issued to or owned by such defendant within five (5) years from such date of entry, and defendants are each enjoined and restrained from making any sale or other disposition of any of the aforesaid patents which deprives such defendant of the power or authority to grant such licenses, unless such defendant sells, transfers or assigns patents and requires, as a condition of such sale, transfer or assignment, that the purchaser, transferee or assignee shall observe the requirements of Sections VIII and IX of this Final Judgment with respect to the patents so acquired, and the purchaser, transferee or assignee shall file with this Court, prior to consumation of said transactions, an undertaking to be bound

by the provisions of said Sections with respect to the patents so acquired;

(B) Each defendant is enjoined and restrained from including any restriction or condition whatsoever in any license or sublicense, as the case may be, granted by it pursuant to the provisions of this Section except that (1) the license may be made nontransferable; (2) a reasonable non-discriminatory royalty may be charged; (3) reasonable provisions may be made for periodic inspection of the books and records of the licensee by an independent auditor or any person acceptable to the licensee who shall report to the licensor only the amount of the royalty due and payable; (4) reasonable provision may be made for cancellation of the license upon failure of the licensee to pay the royalty or to permit the inspection of its books and records as hereinabove provided; (5) reasonable provision may be made for marking the slip covers manufactured, used or sold by the licensee under the license with the numbers of the licensed patents covering such slip covers; and (6) the license shall provide that the licensee cancel the license at any time by giving 30 days' notice in writing to the licensor;

(C) Upon receipt of a written request for a license or sublicense, as the case may be, under the provisions of this Section VIII, such defendant shall advise the applicant in writing of the royalty which it deems reasonable for the future patents to which the request pertains. If the parties are unable to agree upon a reasonable royalty within 60 days from the date of such request for the license was received by such defendant, the applicant therefor may forthwith apply to this Court for the determination of a reasonable royalty, and the defendant shall, upon receipt of notice of the filing, or upon the filing, of such application, promptly give notice thereof to the Attorney General. In any such proceeding the burden of proof shall be on the defendant to establish the reasonableness

of the royalty requested, and the reasonable royalty rates, if any, determined by this Court shall apply to the applicant and all other licensees under the same future patents. Pending the completion of negotiations or any such proceeding, the applicant shall have the right to make, use and vend under the future patents to which its application pertains without payment of royalty or other compensation as above provided, but subject to the provisions of subsection (D) of this Section VIII;

(D) Where the applicant has the right to make, use and vend under any patents pursuant to subsection (C) of this Section VIII, said applicant of the defendant may apply to this Court to fix an interim royalty rate pending final determination of what constitutes a reasonable royalty. If this Court fixes such interim royalty rate, the defendant shall then issue and the applicant shall accept a license or, as the case may be, a sublicense, providing for the periodic payment of royalties at such interim rate from the date of the filing of such application by the applicant. If the applicant fails to accept such license or fails to pay the interim royalty in accordance therewith, such action shall be ground for the dismissal of his application, and his rights under subsection (C) shall terminate. Where an interim license or sublicense has been issued pursuant to this subsection, reasonably royalty rates, if any, as finally determined by this Court shall be retroactive for the applicant and all other licensees under the same future patents to the date the applicant files his application with this Court;

(E) Nothing herein shall prevent any applicant from attacking in the aforesaid proceedings or in any other controversy the validity or scope of any of the future patents nor shall this Final Judgment be construed as importing any validity or value to any of said future patents.

IX

Immediately following the entry of this Final Judgment, the defendants shall mail one copy of this Final Judgment to each person with whom any of them has or had a license agreement under any patent or patents to which Section VIII of this Final Judgment may apply, to each applicant who has in writing heretofore applied for and has not received a license to manufacture, use or sell slip covers under said patent or patents, and to each person against whom any of them has, with regard to slip covers, ever instituted or threatened in writing to institute an infringement suit under of any these patents. Defendants shall in addition, within 60 days following the entry of this Final Judgment, cause a notice of the entry of this decree and summary of its provisions to be inserted in the principal trade journal of the slip cover industry, which notice shall run for two consecutive issues, shall be no less than one-half page in size, and shall be in a form approved by the Attorney General of the United States. Should the defendants and the Attorney General be unable to agree within 30 days from the date of this decree as to the form of such notice to be inserted, each party shall at that time submit to the Court a form of proposed insertion and the Court shall then determine its content. Within 30 days following the first insertion of the notice in said trade paper, the said defendants shall file with this Court a verified statment setting forth the steps taken to comply with the above requirements of this Section IX.

X

For the purpose of securing compliance with this Final Judgment and for no other purpose, duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to any defendant, made to its or his principal office, be permitted, subject to any legally

recognized privilege, (1) access during the office hours of said defendant to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of said defendant relating to any matters contained in this Final Judgment, and (2) subject to the reasonable convenience of said defendant and without restraint or interference from it to interview officers or employees of said defendant, who may have counsel present, regarding any such matters; and (3) upon request the defendant shall submit such reports in writing to the Department of Justice with respect to matters contained in this Final Judgment as may from time to time be necessary to the enforcement of this Final Judgment. No information obtained by the means provided in this Section shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of such Department, except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

XI

Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification or termination of any of the provisions thereof, for the purpose of the enforcement of compliance therewith and for the punishment of violations thereof.

XII

Judgment is entered against defendants for all costs to be taxed in this proceeding.

Dated: March 14, 1957

/s/ THOMAS J. CLARY
United States District Judge

APPENDIX C

SHERMAN ACT

Sec. 1 [26 Stat. 209; 50 Stat. 693; 15 U. S. C. § 1.] Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: *Provided*, That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 5, as amended and supplemented, of the Act entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes", approved September 26, 1914: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding

one year, or by both said punishments, in the discretion of the court.

Sec. 2. [26 Stat. 209; 15 U. S. C. § 2.] Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

* * * * * * * * * * *

Sec. 4. [26 Stat. 209; 15 U. S. C. § 4.] The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 254

THE COMLY MANUFACTURING COMPANY and FRED E. KATZNER, *Appellants*

v.

UNITED STATES OF AMERICA, *Appellee*

On Appeal from the United States District Court for the Eastern District of Pennsylvania

BRIEF IN OPPOSITION TO THE GOVERNMENT'S MOTION TO AFFIRM

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IN THE

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No. 254

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On Appeal from the United States District Court for the Eastern District of Pennsylvania

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BRIEF IN OPPOSITION TO THE GOVERNMENT'S MOTION TO AFFIRM

The Government's Motion to Affirm is, in effect, an argument on the merits which confesses that the undisputed facts cannot support the judgment below. It assumes that this Court will now review the entire record before the District Court and, without argument, make the findings of fact required to support

the trade practice relief. Although the execution of the license agreement and the joint enforcement of the Oppenheimer patent were undisputed on the record, there was a sharp dispute as to the defendants' alleged trade practices which the lower Court did not and could not resolve by summary procedure. The Government has not even attempted to support the provisions of the judgment attacked on this appeal by pointing to any factual conclusions of the District Court as to these practices. It makes no effort to show that either defendant made any use of these practices which was itself illegal. Instead, the Government has sought to defend this extraneous, non-patent relief by placing it under the umbrella of "the conspiracy" even though the court below in its discussion of the facts it regarded as undisputed (J. St. No. 254, pp. 7a to 17a) specifically limited the scope of the conspiracy it found to the 1938 license agreement and the defendants' actions thereunder.

There is nothing in the license agreement about slip covers other than those manufactured under the Oppenheimer patent, or about trade practices, and the Court made no mention anywhere in its opinion of the trade practices enjoined by Sections VI(A) through (E) of its decree except to note that the Government stated in its complaint that they were a part of the alleged conspiracy.

In its attempt to justify the trade practice injunctions, the Government does not cite the Court's opinion. Instead it cites correspondence from which, it claims, an inference may be drawn that these trade practices were part of the enjoined conspiracy. The Government would have this court infer from the fact that the defendants admitted the genuineness

of the documents comprising this correspondence and offered no countervailing affidavits, that the conclusions of fact which the Government sought to derive from these documents were also admitted and undisputed. Thus at pages 13 and 14 of its motion, we find a comprehensive statement of supposedly indisputable inferences which this court is now asked to draw from specified evidence not mentioned in the opinion below. The fact that these inferences are in the teeth of the evidence, (Cf. pages 13 and 18 of Comfy's Jurisdictional Statement) was recognized by the court below when it refused to draw any of these inferences in its opinion.

For example, in its Motion to Affirm, the sole exhibit in the record to which the Government could refer as the source of the supposedly undisputed fact that "the conspirators . . . made disparaging statements about competitors' products" which were "designed to, and did aid them in carrying out their conspiracy to restrain and monopolize the knitted slip cover industry" was GX 463. (M/A p. 27 and p. 14) That was a letter from Comfy's main office to one of its agents on the West Coast stating that Comfy's slip covers were of higher quality than Vatco's. The letter commences as follows:

> "Naturally, it is not a good policy to endeavor to discount another manufacturer's merchandise to build up your own. However, since you are now part of our organization I feel you are entitled to all facts pertaining to competition and need pass along to customers only information they are interested in."

There was no suggestion in this exhibit or any other document in the record that the factual comparison

made by the writer between the Vatco covers and Comfy's covers was false in any respect. There was no suggestion that Surefit was in any way connected with the sending of this letter or had any knowledge of it. Whereas the letter pointed out that Surefit had a license under the Oppenheimer patent and Vatco did not, it states that "we do not advise stressing this angle as we are primarily interested in making the finest product we know how and devoting our efforts to merchandising slip covers." The citation of this lone letter is itself an admission that there is no factual foundation in the record for paragraph VI(B) of the judgment.

Similarly, the sole record citation for the Government's assertion that "the conspirators contracted with suppliers that the latter would not sell to other manufacturers" is GX 465 (M/A p. 27 and p. 14). This document is a full-line requirements contract which Surefit had with a supplier of adjustable fasteners. Far from showing that Comfy was conspiring or cooperating or combining with Surefit, the face of the document itself shows that Comfy was one of the competitors whom Surefit was precluding from this source of supply. Yet this exhibit is the only evidence cited to justify paragraph VI(E) of the judgment. The Government is asking this Court to hold that the defendants' admission of the genuineness of this agreement constituted an admission of the truth of the factual inference which the Government sought to derive from it, i.e., that it was entered into "by conspirators" for the purpose of "carrying out their conspiracy to restrain and monopolize the knitted slip cover industry." (M/A, p. 27)

There is not a suggestion in any of the documents cited by the Government or any other evidence in the record that Comfy and Surefit even communicated with each other with regard to any of the trade practices enjoined by Section VI(A) through (E) of the Court's decree or with regard to any other aspect of selling non-patented slipcovers. The Government's exhibits do show that Comfy offered special concessions to take business away from Surefit (GX 443, 456 and 459) and that Surefit tried, where it could, to push Comfy out of other accounts (GX 420). In any event, whether the course of conduct reflected in this correspondence shows individual action whereby the defendants employed these trade practices to take business from each other, or evidences a collusive use of these practices is, at the very least, a question of fact presented on the face of the Government's own evidence. No affidavits were necessary to raise this issue.

We do not question the right of the Government's advocates to urge upon this Court in argument any version of the facts that they believe the evidence will support. We do insist, however, that the Government may not properly present its version of the facts to this Court as facts which were undisputed below. The facts which the Court below regarded as undisputed are set out in the opinion below. While that Court was relieved of the necessity of making findings as to disputed issues of fact by the summary judgment procedure, it was obliged to indicate in its opinion all of the material facts it thought were undisputed if the opinion were to serve its purpose of showing the basis for the judgment.

By arguing the facts, the Government's motion to affirm admits that the summary judgment below cannot be sustained on the face of the opinion below. If the arguments now made by the Government are to be entertained at all they should be heard upon a complete record in the District Court, where the Government's factual contentions may be tested by cross-examination of its witnesses and by countervailing proof. Only then would this Court have the benefit of the District Court's views as to the contested trade practice facts, about which the opinion below is now silent.

The extremely narrow scope of the undisputed facts belatedly receives implied recognition in the Government's motion (M/A, p. 27), where it describes the alleged conspiracy as one "to restrain and monopolize the knitted slip-cover industry" and refers to other manufacturers as being barred "from that segment of the market." While there is not and never was any such industry as the *knitted* slip-cover industry, the statement does recognize that the Government's proof showed no restraint or agreement of any kind with respect to any kind of slip-cover except the patented knitted slip-cover. If the Government had been content with relief intended to correct restraints as to knitted slip-covers the main issues presented by this appeal would not exist. However, the Court below was induced to find a conspiracy to fix the price of, and to monopolize ready-made furniture slip-covers, of which knitted covers are only one variety. There was no proof cited in the opinion below, and no attempt is made by the Government to cite any here, that knitted slip-covers were so important a factor in the ready-made field as to supply

power to monopolize it. As pointed out in our Jurisdictional Statement, there was no proof even of the relationship which knitted slip-cover sales bore to the defendant's own total sales of ready-made slip-covers, to say nothing of the industry-wide facts which would be essential to any appraisal of the importance of knitted slip-covers in the whole ready-made furniture slip-cover field.

The Government now seeks to obscure the fact that the offense actually found by the Court below was, at most, an unsuccessful attempt to gain a monopoly, by referring to that offense as a conspiracy to monopolize rather than a concerted attempt to monopolize. Regardless of the terminology used, the Government did not prove, and the Court below did not hold that the defendants had, jointly or individually, actually monopolized the ready-made furniture slip-cover field. The Government's argument about divesting the defendants of the fruits of a monopoly or prying open a market, is therefore specious except as it refers to the patent relief, and Sections VII and VIII of the decree were more than adequate to open to competitors the only kind of monopoly the defendants ever had, i.e., a patent monopoly.

The Government succeeded in persuading the Court below that once a summary decision has been made, there is no need to shape the relief to fit the offense found. Accordingly the Court made the relief as broad as the allegations of the complaint even though the evidence offered to support the general allegations as to the slip-cover business was so conflicting as to prevent any summary judgment that those allegations were true. In the part of its opinion

headed "The Facts," the Court confined the undisputed facts to the subject-matter of the defendants' license agreement of 1938 and its joint enforcement. But by the time the Court handed down its judgment seven and one-half months later, the distinction between the area of undisputed facts and the area of facts at issue had become obscured. Although the Government offered no further evidence, virtually all of the relief which it sought was then granted, both as to the alleged patent abuse and as to the alleged trade practices which had no relation to any patent or to any kind of agreement between the defendants. Instead of relying upon the Court's opinion, the Government relied upon the bare allegations of the complaint to connect the trade practice relief with the patent evidence.

What the Government is urging on this court has far-reaching and disturbing implications: In effect, it is arguing that because the defendants admitted entering into a license agreement for patented knitted slip covers which the court found on summary judgment to be in violation of the Sherman Act, and because they admitted the genuineness of a mass of other documents offered by the Government, they are not entitled to a trial of the factual issues raised by these documents as to the conduct of their unpatented slip-cover business. By this sort of fallacious reasoning, the Government succeeded below in preventing a trial which would have provided a full examination of the course of business at issue and the industry facts needed to determine what, if any, judicial surgery was appropriate.

Not content with having led the lower Court to the erroneous conclusion that the summary nature of the

judgment provided no effective limitation on the scope of the relief, the Government is now proposing a further short-cutting of the defendants' rights by trying to preclude effective appellate review. We submit that however great is the need for expediting the disposition of antitrust litigation and relieving the congestion of crowded Court calendars, it is a denial of due process to subject these defendants to severe restrictions on their ability to survive in a highly competitive business without according them the protection of a trial of disputed issues of fact, and a fortiori, without plenary review of such arbitrary action.

Respectfully submitted,

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NOV 15 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 254

THE COMEY MANUFACTURING COMPANY and FRED E. KATZNER, *Appellants*

v.

UNITED STATES OF AMERICA, *Appellee*

On Appeal from the United States District Court for the Eastern District of Pennsylvania

MOTION FOR MODIFICATION OF JUDGMENT AND PETITION FOR REHEARING

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UNITED STATES OF AMERICA, *Appellee*.

On Appeal from the United States District Court for the Eastern District of Pennsylvania

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MOTION FOR MODIFICATION OF JUDGMENT AND PETITION FOR REHEARING

The summary judgment below was affirmed per curiam on October 14, 1957 upon the Government's motion with Mr. Justice Harlan and Mr. Justice Whittaker dissenting. We join in the Petition for Rehearing filed by the appellants in Number 238 for the reasons therein stated.

MOTION FOR MODIFICATION OF JUDGMENT

Appellants respectfully move this Court to modify its Order affirming the Final Judgment below by excluding from said affirmance paragraph VI(C) of the said judgment on the ground that (1) the District Court had no jurisdiction to enter that injunction, and (2) said paragraph is so vague and ambiguous as to deprive the appellants of due process of law.

BRIEF IN SUPPORT OF MOTION FOR MODIFICATION

1. Even if all of the allegations of the complaint are assumed to have been established by undisputed facts, the District Court had no jurisdiction to include paragraph VI(C) in its judgment.

Paragraph VI(C) of the Final Judgment in this case prohibits each defendant from "granting to any retailer of slip covers special discounts, advertising allowances or return privileges which are not available to others on proportionately equal terms" (J.S. p. 35a). This paragraph prohibits the kind of discrimination between retailers that Congress has authorized the Federal Trade Commission to define in proceedings brought under the Robinson-Patman Act, 15 U.S.C., Sec. 13. The record in this case shows not only an absence of jurisdiction to enter this injunction but a complete absence of facts needed to give the injunction meaning.

The Complaint does not allege that the defendants failed to accord proportionately equal treatment to their retail customers.[1] In the District Court the

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[1] Paragraph 11(i)(2) of the Complaint herein, the only paragraph dealing with special discounts, etc., states:

> "Defendants Krasnov, Comfy and Katzner would injure and destroy the competition of other *manufacturers* in local areas selected by said defendants by: . . . (2) Granting special discounts, excessive advertising allowances, and abnormal return privileges to retailers *who agree to carry their merchandise exclusively;*" (emphasis ours).

Government made no claim that discrimination between retailers was a means or object of the conspiracy. The Government's counsel argued below that paragraph VI(C) should be added to the other relief because it enjoined nothing more than what was already prohibited by the Robinson-Patman Act.[2] And in fact, the "proportionately equal" test of discrimination was derived from Section 2(d) of that Act.[3] In granting this relief, the District Court erroneously assumed that practices prohibited by the Robinson-Patman Act could be enjoined in a proceeding brought under Section 4 of the Sherman Act (15 U.S.C.

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[2] Mr. Tubridy, for the Government, made the following statement about this provision in oral argument:

> "There is nothing there which is set forth which the law does not say they are not supposed to do, and the Federal Trade Commission has recently come down with a case, and that has been attached here for Your Honor's convenience, United States of America, before the Federal Trade Commission, in the matter of Henry Rosenfeld, which condemns these practices of giving these discriminatory allowances not on equal terms to all people." (R. 902)

The Rosenfeld opinion was one in which the Federal Trade Commission had charged and found specific violations of Section 2(d).

The Government's argument would have justified such additional provisions as prohibiting the transportation of stolen slip covers across state lines or the fraudulent use of the mails to sell slip covers.

[3] Section 2(d): It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities. 15 U. S. C. Sec. 13(d).

Sec. 4), even though such practices were not a means or an end of the alleged Sherman Act conspiracy.

When these appellants called attention in their Jurisdictional Statement (J.S. pp. 13-16) to the unsoundness of this argument, it was abandoned here. The Government's argument here was that by this provision "the Court was prohibiting restrictive practices which were a part of the conspiracy and which, if continued, would permit the conspirators to retain the fruits of their unlawful conduct". (M.A. p. 29). In its Motion to Affirm the Government relied solely upon correspondence cited at pages 13-14 of the Motion, to support paragraph VI(C). This correspondence is characterized by the Government as evidencing an alleged purpose to use special deals, rebates, advertising allowances and exchange privileges as an inducement to exclusive dealing. The correspondence does not purport to establish the facts about any particular allowance, discount or privilege which would prove discrimination between retailers. The Government makes no claim that any of these arrangements were granted to competing retailers upon disproportionate terms.

The question which was at issue below was whether or not the defendants had used sales promotional devices to take business away from other manufacturers by inducing retailers to buy exclusively from the defendants. While the District Court did not find in its opinion that these inducements had been so used in the past it nevertheless gave drastic relief against such a use in the future by flatly prohibiting the defendants from making any agreements with retailers which excluded other manufacturers. See Paragraph

VI(D) of Judgment.[4] Instead of merely enjoining the alleged use of special concessions in order to obtain exclusive dealing agreements, the Court prohibited *all* such exclusive agreements, however induced. This was complete relief against the alleged use of special concessions and there was no practical or legal justification for the added injunction of paragraph VI(C).

Since the retailer discrimination enjoined by paragraph VI(C) was outside the issues joined by the pleadings, the District Court was completely lacking in jurisdiction to include paragraph VI(C) in its Final Judgment. Cf. Freeman on Judgments (1925 Ed.) Secs. 354 and 355, pp. 734-737; *Reynolds* v. *Stockton*, 140 U. S. 254, 265 (1891).

2. Paragraph VI(C) is so vague and ambiguous as to violate due process because no record was ever made to give it meaning.

Paragraph VI(C) places the defendants in jeopardy of a contempt citation any time they grant to any retailer a discount, an allowance or return privilege. The only standard to guide them is the test that the allowance be available to others on "proportionately equal terms." This is not, by itself, an intelligible guide to business conduct. The difficulty is that the Robinson-

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[4] Paragraph VI(D) provides that: "Defendants are jointly and severally enjoined and restrained from: . . . (D) Entering into any contract or understanding with a retailer of slip covers obligating the latter to carry exclusively slip covers manufactured by the defendant, or not to carry or deal in slip covers manufactured by others. However, this provision shall not apply to an agreement with the owner of an individual store in any city having a population (based on the last official Decennial Census) of less than 25,000 inhabitants.

Patman Act sections which refer to proportionally equal terms "purport to prescribe a standard for determining what constitutes equal treatment in the granting of merchandising payments and services, whereas actually no standard is provided. The requirement is that the payments or services must be made available to different purchases in proportion to . . . (?), and the Federal Trade Commission is left to fill in the blank."[5] No one has filled in this blank for these appellants.

Congress has in part compensated for this vagueness by providing that no defendant can be enjoined from violating the "proportionally equal" standard without a hearing before the Federal Trade Commission or a Court in which the phrase is applied to his own past transactions. In such cases, the injunction is given some meaning by the context of the specific litigation out of which it arose.

The defendants in this case, however, cannot tell from the evidence the Government introduced, which, if any of the promotional arrangements they have made with retailers in the past, are now thought to be prohibited by Section VI(C) of the judgment. The defendants have never been told which of these discounts, allowances and privileges the Government now thinks were not available to competing retailers "on proportionately equal terms".

This Court has explicitly disapproved an injunction enforcing a Robinson-Patman Act order which left for determination in contempt proceedings the task

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[5] Cyrus Austin, Price Discrimination and Related Problems under the Robinson-Patman Act, American Law Institute (1953), p. 130.

of applying a vague standard to specific conduct. *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 54. This Court there said:

> "One of the reasons for entrusting enforcement of this Act primarily to the Commission, a body of experts, was to authorize it to hear evidence as to given differential practices and to make findings concerning possible injury to competition. Such findings are to form the basis for cease and desist orders definitely restraining the particular discriminatory practices which may tend to injure competition without justification."

In all of the cases to date in which a court has construed the "proportionally equal" language of Sections 2(d) and (e) of the Robinson-Patman Act specific findings of this kind have preceded any injunction.[6] Here, there is not only a complete absence of findings about competition among retailers, but a complete lack of evidence as well. Although paragraph VI(C) deals only with retailer discrimination, no retailer claimed injury from discriminatory practices in this case and there was no testimony about retailer competition.

The absence of an specification of the particular discounts, allowances and privileges granted to retailers in the past which the Government is now seeking to enjoin is especially prejudicial where, as here, the Government obtains an injunction upon a motion for summary judgment. This Court has vacated Sherman Act injunctions for vagueness where general terms have not been given a more specific meaning by

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[6] Cf. *Corn Products Co.* v. *FTC*, 324 U. S. 726, 739; *Elizabeth Arden* v. *FTC*, 156 Fed (2d) 132; *Elizabeth Arden* v. *Gus Blass*, 150 Fed. (2d) 988.

specific findings made after a full trial.[7] Thus in *Schine Chain Theaters* v. *U. S.*, 334 U. S. 110, this Court vacated an injunction against clearances "which unreasonably restrict" competition among motion picture theatres because the findings as to the unreasonable clearance evidence failed to give "a specific context to the concept of unreasonable as applied to clearance". Id. pp. 125-26. In the instant case there was not event an attempt to give a specific context to the concept of "proportionately equal" as applied to slip cover sale terms, either by evidence or by findings.

Here the appellants were subjected on summary judgment to a sweeping injunction couched in general terms and they do not have the benefit of any record which could give more specific meaning to the general terms. The appellants are the only manufacturers of any product who are criminally liable the first time they fail to interpret correctly the phrase "proportionately equal terms". They are also the only manufacturers who have ever been enjoined from violating the Robinson-Patman Act without a trial context that gives meaning to the injunction.

In addition to creating unwarranted criminal contempt liability paragraph VI(C) is an invitation to retailers to bring treble damage suits for injuries never in fact sustained. According to Section 5 of the Clayton Act (16 U. S. C. 16), paragraph VI(C)'s prohibition of unlawful discrimination against retailers may

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[7] In *Hartford-Empire Co. et al.* v. *United States*, this Court held that a injunction against antitrust violations "must not be 'so vague as to put the whole conduct of the defendants' business at the peril of a summons for contempt'; enjoin 'all possible breaches of the law'; or cause the defendant hereafter not 'to be under the protection of the law of the land'." 323 U. S. 406, 410.

be used as prima facie evidence that the defendants have committed such offenses. While a judicial examination of the record will show that such offenses were not litigated in this case and thus may afford a defense in the private suit, the matter should not be left for future determination. Appellants ought not to have the burden of persuading some other court that the affirmance of paragraph VI(C) was only a fortuitous result of this Court's refusal to grant plenary consideration.

The relative unimportance to this Court of the subject matter of this case, should not require that the deprivation of due process embedded in paragraph VI(C) of the judgment stand uncorrected. Upon the face of the pleadings and motion papers, there is a total lack of jurisdiction to enjoin these defendants from the prohibited conduct, and by its terms, paragraph VI(C) is so vague and indefinite as to impose an intolerable risk of contempt liability.

WHEREFORE, Appellants respectfully submit that this Court should modify its Order of Affirmance herein so as to vacate paragraph VI(C) of the judgment below.

Respectfully submitted,

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Certificate

I hereby certify that this Petition and Motion is presented in good faith and not for delay.

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Attorney for Appellants.

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FILED
NOV 27 1957
JOHN T. FEY, Clerk

No. 254

In the Supreme Court of the United States

OCTOBER TERM, 1957

THE COMFY MANUFACTURING COMPANY AND FRED E. KATZNER, APPELLANTS

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MEMORANDUM IN OPPOSITION TO APPELLANTS' MOTION FOR MODIFICATION OF JUDGMENT

J. LEE RANKIN,
Solicitor General,
Department of Justice, Washington 25, D. C.

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 254

THE COMFY MANUFACTURING COMPANY AND FRED E. KATZNER, APPELLANTS

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MEMORANDUM IN OPPOSITION TO APPELLANTS' MOTION FOR MODIFICATION OF JUDGMENT

Appellants have moved this Court to modify its order of October 14, 1957, which affirmed *per curiam* the judgment of the district court, so as to vacate paragraph VI (C) of that judgment. The principal ground of the motion is that paragraph VI (C), which enjoins appellants from granting to retailers special discounts, advertising allowances or return privileges which are not available to others "on proportionately equal terms," is so "vague and indefinite" as to "impose an intolerable risk of contempt liability" (Motion, p. 9).[1]

[1] Appellants also argue (Motion, pp. 2–5) that paragraph VI (C) was improperly included in the judgment. That contention was fully answered at pages 28–29 of the Government's Motion to Affirm.

Appellants did not make this contention either in the district court (although they objected to paragraph VI (C) on another ground),[2] or in this Court in their Jurisdictional Statement or in their Brief in Opposition to the Government's Motion to Affirm. In these circumstances, such a belated attempt to raise the issue, after this Court already has affirmed the judgment below, must be rejected. Although we believe that paragraph VI (C) is sufficiently specific so that appellants "may know their duties and unintended contempts may not occur" (*International Salt Co.* v. *United States*, 332 U. S. 392, 400), we submit that the proper, indeed the only, way for appellants to raise the issue of vagueness at this stage of the case is by petitioning the district court, pursuant to paragraph XI of the judgment, for construction or modification of paragraph VI (C).[3] Cf. *International Salt, supra*, at 401–402.

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[2] Paragraph VI contains a number of provisions enjoining various restrictive trade practices. In their objections to the Government's proposed judgment (which included paragraph VI (C) in its present form), appellants urged only that paragraph VI in its entirety was improper, on the ground that there was nothing in the court's opinion to justify any injunctive relief against the trade practices. Defendants' Memorandum in Opposition to the Government's Proposed Final Judgment, pp. 1–3; Transcript of Hearing on Exceptions of Defendants Sure-Fit and Comfy to Proposed Final Judgment, December 31, 1956, pp. 49–51, 87–88, 91–92.

[3] In paragraph XI the district court retained jurisdiction "for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate to the construction or carrying out of this Final Judgment, for the modification or termination of any of the provisions thereof * * *."

It is respectfully submitted, therefore, that the
otion for modification of the judgment should be
nied.

J. LEE RANKIN,
Solicitor General.

NOVEMBER 1957.

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FILED
JUL 9 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. ~~[illegible]~~ 253

ARTHUR OPPENHEIMER, JR., *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

On Appeal from the United States District Court for the Eastern District of Pennsylvania

STATEMENT AS TO JURISDICTION

JOSEPH F. PADEN,
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Attorney for Appellant

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No.

ARTHUR OPPENHEIMER, JR., *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

On Appeal from the United States District Court for the Eastern District of Pennsylvania

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STATEMENT AS TO JURISDICTION

Appellant appeals from the Final Judgment of the United States District Court for the Eastern District of Pennsylvania, filed on March 14, 1957, in said cause, in a proceeding brought by the United States under Section 4 of the Sherman Act and submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW.

The opinion of the District Court for the Eastern District of Pennsylvania is reported at 143 F. Supp. 184 and is reproduced as Appendix A to the statement of the appellant The Comfy Manufacturing Co. The Final Judgment is unreported and is printed as Appendix B. to The Comfy Manufacturing Co.'s statement.

JURISDICTION

This suit was brought by the Government under 15 U.S.C. Sec. 4 to enjoin an alleged conspiracy in unreasonable restraint of trade in the slip cover industry in violation of Section 1 of the Sherman Act (16 U.S.C. § 1), and an alleged conspiracy to monopolize the slip cover industry in violation of Section 2 of that Act (16 U.S.C. § 2). Judgment for the plaintiff was entered on March 14, 1957 and Notice of Appeal was filed on behalf of defendant Arthur Oppenheimer, Jr., in the U. S. District Court for the Eastern District of Pennsylvania on May 1, 1957. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 15 U.S. § 29. The following decisions sustain the jurisdiction of this Court to review such a judgment on direct appeal: *United States* v. *California Cooperative Canneries*, 279 U.S. 553; *United States* v. *Times-Picayune Publishing Co.*, 345 U.S. 594.

STATUTE INVOLVED

Sections 1, 2 and 4 of the Sherman Act, 16 U.S.C. §§ 1, 2, 4.

QUESTIONS PRESENTED

1. May a patentee who assigned his patent and, upon the assignee sub-licensing another, contributed a sum of money to expenses involving the protection of the patent against infringers and who agreed to the reduction of royalties payable to him, be held to have violated the antitrust laws?

2. May a patentee under the facts set forth in paragraph 1 above be held to have violated the antitrust laws without proof that he had knowledge of the acts of his assignee and the sublicensee?

STATEMENT OF THE CASE

The complaint charges the defendants as being engaged in a combination and conspiracy to violate the antitrust laws in the manufacture and sale of ready-made furniture slip covers.

Appellant Oppenheimer was the inventor of the subject matter of Patent No. 2,100,868 dated November 30, 1937 (expired November 30, 1954). Oppenheimer assigned his patent to The Comfy Manufacturing Co. and by an agreement dated October 25, 1937, he reserved a royalty to himself. Comfy sublicensed Sure-Fit Products Co. on October 4, 1938 as owner of the patent. Oppenheimer approved of the sublicense.

Oppenheimer, as assignor, was not in the slip cover business or in the employ of either Comfy or Sure-Fit. His interest lay entirely in collecting royalties on his patent.

On the Government's motion for Summary Judgment Oppenheimer was represented by counsel. The Court held that because he approved the Sure-Fit license, agreed to contribute a sum of money to the

protection of the patent and agreed to a reduction of the royalties, he was a party to the alleged conspiracy.

THE QUESTIONS PRESENTED BY THE APPELLANT ARE SUBSTANTIAL

1. The District Court decision of the case on Summary Judgment was an abuse of the right of the appellant which this Court should correct.

2. The Appellant Oppenheimer was not engaged in the slip cover business. He was employed by Bloomingdale Bros. in New York in its drapery department when he made the invention of his patent in 1935. He assigned his patent to The Comfy Manufacturing Co. and by an agreement dated October 25, 1937, was to receive royalties from Comfy on the basis of its sales. Comfy in turn licensed Sure-Fit on a royalty basis. The agreement with Sure-Fit was approved by Oppenheimer "in consideration of the potential benefits and advantages which said agreement represented to (him)".

Oppenheimer contributed a sum of money to the expenses of defending the patent against infringers and agreed to a reduction of the royalties as the business developed.

This is the substance of Oppenheimer's activities. He was not in the slip cover business nor in the employ of either Comfy or Sure-Fit. His activities were in other directions, such as being active in 1935 in the department store business. In 1941 he joined O.P.A. In April 1942 he enlisted in the Army. In November 1945 he bought a department store in Boise, Idaho.

It seems clear that Oppenheimer stood only in the position of an inventor interested in collecting royalties

on his patent. He had a right as such to contribute a sum of money to the protection of his patent and to revise the royalty rate on such terms as he judged to be reasonable.

There is no proof that Oppenheimer had knowledge of the alleged acts of Comfy and Sure-Fit. Such proof is required before he can be held to be a co-conspirator. *U. S.* v. *Falcone*, 311 U.S. 205, 210-211.

The decision below holding Oppenheimer to be a party to the conspiracy warrants review by this Court.

Respectfully submitted,

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